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History and the Boundaries of Legality: Historical Evidence at the ECCC

Andrew Mamo

The Extraordinary Chambers in the Courts of Cambodia (ECCC) are marked by the amount of time that has elapsed between the fall of Democratic Kampuchea in 1979 and the creation of the tribunal. Does this passage of time matter? There are obvious practical reasons why it does: suspects die, witnesses die or have their memories fade, documents are lost and found, theories of accountability gain or lose currency within the broader public. And yet, formally, the mechanisms of criminal justice continue to operate despite the intervening years. The narrow jurisdiction limits the court's attention to the events of 1975–1979, and potential evidence must meet legal requirements of relevance in order to be admissible. Beyond the immediate questions of the quality of the evidence, does history matter? Should it?

One answer is that this history is largely irrelevant to the legal questions at issue. In this view, the events of Democratic Kampuchea from 1975–1979 can be tried without reference to the events of the intervening years. The facts relating to the crimes stand on their own, and the legal theories relate strictly to those facts and events. This approach would find nothing in particular to distinguish the operations of the ECCC from those of any other tribunal, save for the unfortunate problem of mortality and imperfect memory.

Another possible (and plausible) answer is that the extralegal influence of history is comparable in kind to the extralegal influence of political interference — a matter of obvious and sustained concern at the ECCC. In this theory, advanced by several of the defense counsel, the evidence from 1975–1979 must be read in light of intervening events, which include the years of Vietnamese occupation, the collection of documentary evidence as part of an attempt to hold Khmer Rouge leaders accountable, and the stranglehold that the Heng Samrin–Hun Sen line of

leadership has had over Cambodian political life. This historical gloss suggests the need for skepticism in reading evidence, and may even raise the question of what has been omitted (intentionally or unintentionally) from the documentary record. In this telling, the influence of history is effectively the accumulation of years of political interference, culminating in the well-known suspicions of interference on the Cambodian side of the court.

I argue for a third understanding of the role of history, which neither reads it out through a single-minded focus on the face of the evidence, nor vests it with the power of thorough corruption. I argue instead that an understanding of the historical context of the court and of the evidence that is presented before it reframes the basic relationship between the court and Cambodian society. For, despite the differences between the two previous accountings of history, both insist on maintaining a strict boundary between the legal procedure of the court and the extralegal influences of society—the first version, in order to insist that the court can repel these influences; the second version, in order to insist that the court cannot.¹ But this insistence on absolutism ignores the facts that the court is itself an actor in the drama of Cambodian history, a product of both domestic and international politics, and that just as attempts to determine accountability in civil society occur in the shadow of the law, so too are attempts to ground judicial fact-finding in robust historical accounts inevitably shaped by a wider historical discourse.

Crucially, this understanding is not an attempt to view law as the continuation of politics by other means.² It is, rather, a pragmatic recognition that the imperfections of the international

¹ Jenia Turner distinguishes between the legal and political modes of international criminal trials. However, my argument is that both must be considered simultaneously in these contexts, because both are present simultaneously. Any given issue may fall on one side or the other, but the fundamental contention is that the legal issues are tied to a political context, and the political questions are cabined by the legal form. See Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 534 (2008).

² Perhaps more appropriate than the Clausewitzian aphorism to which this refers is Foucault's inversion, "politics is the continuation of war by other means," in light of the theory advanced by Nuon Chea defense attorney Jasper

legal order do, in fact, exist, and do, in fact, affect the structure and operations of international tribunals. History roots the idealized space of legal process in the messy soil from which real, extant, tribunals grow. Frank acknowledgement of historical complexity calls attention to the construction of the boundary that attempts to protect the sanctity of the legal process from the brute power politics of the social world. I suggest that it is this boundary that deserves our scrutiny and the concomitant attempt to purify law of history. To the extent that we believe it important to defend the formalities and protections of legal process from extralegal factors,³ we must appreciate that this separation does not occur naturally, but must be built. Far from leading to the collapse of law into politics, history provides the tools with which to create legal spaces where they are not yet to be found. It also clarifies the limits of what law can achieve: the boundary not only keeps law free from undue political or social influences, but also protects the possibility of public discourse from being unduly constrained by legal norms.

I suggest that this issue is common to all international criminal law. But the peculiar context of the ECCC heightens the problem beyond what is experienced at the ICTY, or the ICTR, or the ICC. It magnifies the problems in a way that makes them easier to analyze and diagnose.

This paper proceeds in six parts. The first part builds the argument that the legal validity of the court's judgment depends (at least in part) on leaving open the historical context, and that

Pauw that Case 002 represents the final stage of the internecine struggles of the Communist Party of Kampuchea that have been marked by the revised date of the party's origins, the purge of the Eastern Zone, and the Vietnamese backing of the People's Republic of Kampuchea. See MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976* 15 (David Macey trans., 1997). For more on Pauw's theory, see note 48, *infra*.

³ As Paul Gewirtz puts it, "Maintaining the boundary between the courtroom and ordinary life is a central part of what legal process is all about. Distinctive legal rules of procedure, jurisdiction, and evidence insist upon and define law's autonomous character — indeed, constitute the very basis of a court's authority. The mob may have their faces pressed hard against the courthouse windows, but the achievement of the trial is to keep those forces at bay, or at last to transmute their energy into a stylized formal ritual of proof and judgment." See Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 135 (Peter Brooks and Paul Gewirtz eds., 1996).

the court's broadly historical function is tied to the quality and scope of its narrowly legal work. The boundary must be recognized, but so too must it be permeable. The second part addresses how the structure of the court has been influenced by the past half century of Cambodian wars and the politics of writing Cambodian history. The court did not emerge organically out of the fabric of Cambodian society, but rather represented a highly contested settlement among the United States, the United Nations, and the Cambodian government that reflected contingent historical events around the turn of the millennium. The third part addresses the problems facing the court in its attempts to define the courtroom as a space of law, independent of the vicissitudes of Cambodian politics. These systemic problems influence how the court must cabin the role of non-legal actors who engage with it. The fourth part directly addresses the nature of the boundary by examining how the parties in the court interact with historical experts and with the extensive documentation that has been gathered by archivists, activists, and scholars over the years. The fifth part addresses the boundary from the other side: from efforts by civil society to mobilize the legal machinery to serve non-legal ends of reconciliation and truth.⁴ It asks what the court's findings of fact mean for the writing of Cambodian history, and how attempts to address the past should make use of the court record. If law tries to operationalize history and history tries to problematize law, is there a way to respect each on its own terms? Are the procedural protections of the criminal law compatible with the goals of transitional justice? Finding the approaches of both the process-oriented and the ends-oriented camps lacking, the conclusion suggests an alternative that acknowledges this fundamental tension, and examines how it might mitigate some of the quandaries faced by the ECCC.

⁴ These could, of course, be described as "internal" to the law; reconciliation and truth are, after all, frequently invoked as the goals to which legal processes are directed. I pull them out, however, to contrast a process-oriented legal approach with goal-directed approaches that care less about *law* as the vehicle for achieving them, and care more for heterodox means that may be less regular than a legal system wishes to tolerate. *See also* note 129, *infra*.

I. “Boundary Work” in the Construction of International Criminal Tribunals

The work of drawing boundaries is fundamental to many specialized professions in defining the domain of professional expertise.⁵ Boundaries function to mark off areas of expertise and to protect the workings of expert judgment from both extraneous matters and from the interventions of outsiders.⁶ In developed legal systems, the work involved in boundary drawing is almost invisible; the lines demarcating the law are well-defined and only subject to occasional refinements. In less-developed systems, however, the work of boundary drawing is more obvious — both in establishing the space and in defending it against encroachment.⁷ The integrity of the boundary is essential because the workings of the law must meet the internal standards that the profession requires, and because the findings of the law must be respected *as law* beyond the boundary.⁸

The interplay between the *internal* functioning and validity of the law, on the one hand, and the *external* functioning and validity of the law, on the other, are mutually reinforcing; legal

⁵ See generally ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* (1988). Abbott defines the problem of professional demarcation in terms of function, rather than in terms of analytic distinctions. Boundary drawing between the “contested jurisdictions” of the professions plays a particularly important role in his account.

⁶ While the sociology of professions has a rich literature, I will draw upon models developed in the context of the sociology of the scientific professions, but which I believe are also applicable in the context of law. The basis of this parallel is that both professions distinguish the specialized reasoning of its practitioners from lay social thought. On the construction of a specialized interior space for science in the context of political thought in 17th Century England, see STEVEN SHAPIN AND SIMON SCHAFER, *LEVIATHAN AND THE AIR-PUMP* (1985).

⁷ There is an additional sense in which boundaries are of central importance to the law: in defining jurisdictions. See Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, *Where (or What) Is the Place of Law? An Introduction*, in *THE PLACE OF LAW* 1, 2 (Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey eds., 2003) (“The study of jurisdiction inevitably invites inquiry into the nature of legal boundaries, about what is inside and outside of law. . . . But the very act of drawing sharp boundaries involves an imagination of an outside, a place from which law is constitutively absent. Law is a set of social institutions and practices constructed on the basis of imaginings of a place beyond law’s boundaries.”). These jurisdictional boundaries are crucially important at the ECCC as well: the narrow temporal jurisdiction sets sharp limits on how issues are contextualized. The facts at issue in the trial are primarily contested on this more abstract level and are contrasted with the extra-legal space beyond the courtroom. See the discussion of Koskeniemi, at note 16, *infra*.

⁸ See generally Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 *LAW AND PHILOSOPHY* 643 (2008). Priel challenges the distinction between “laws” and “non-laws,” urging instead a shift to asking about how law is situated within political and moral thought. See *id.* at 690–694.

findings carry weight because they meet the highest standards of the profession, and those standards matter because they serve socially valuable ends.⁹

But the boundary is not fixed. The hard questions exist in the no-man's land that surrounds it, and the work of positioning issues on one side or the other continually reconstitutes the boundary.¹⁰ Transitional justice is largely about identifying problems that are ripe for legal resolution while simultaneously encouraging the development of a democratic and open public sphere, placing it squarely at the boundary. I suggest that questions concerning the scope of prosecutions in international criminal law are particularly hard, due to the inherently political nature of mass atrocities and transitional governments.¹¹

The specific problems facing the ECCC are more complicated still; it is precisely because the court is operating within a space in which non-legal actors, including scholars and politicians, have already engaged in fact-finding and determinations of accountability that it must define itself against the extralegal work that has gone on. What distinguishes the Cambodian context is that the passage of time has allowed for this scholarship to mature beyond its earliest offerings, leading to the complex fusion of mythology, unexamined assumptions, and rigorous scholarly inquiry that attends to the writing of history within a contested political space.¹² The court is therefore placed in an interesting historical position: as it generates trial records through a judicial process that follows its own set of procedural rules, this record sits alongside the existing

⁹ See, e.g., Paul A. Freund, *The Legal Profession*, 92 DAEDALUS 689, 700 (1963) ("Yet the legal profession, no less than the scientific, functions in a lay society that does, and should, judge its performance. If this judgment is to be effective, it must be based on knowledge of the role of the profession and the character of its thinking."). Roger Cotterrell makes a related point when he notes that legal doctrine and sociological understandings of law are necessary complements. See Cotterrell, *Why Must Legal Ideas be Interpreted Sociologically?*, 25 J. OF LAW AND SOCIETY 171, 173 (1998).

¹⁰ See Thomas F. Gieryn, *Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists*, 48 AMERICAN SOCIOLOGICAL REVIEW 781 (1983). While Gieryn's pioneering article is directed toward scientists in particular, I suggest that the demarcation problem is equally pressing in the context of law.

¹¹ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 13 (1998).

¹² See, e.g., DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001).

scholarship and debates about the Democratic Kampuchea (DK) era. While the line drawing is important, the boundary cannot be impermeable.¹³ My argument is neither that this context inherently taints the proceedings,¹⁴ nor that it is irrelevant. My argument is rather that the context heightens the need for line-drawing and brings into stark relief certain themes in transitional justice and on the relationships among law, history, and society in dealing with atrocities. The hybrid legal-historical nature of international criminal trials suggests the need to reexamine the beliefs about lawfulness and fairness that attach to the maintenance of a firm separation between law and history.¹⁵

Why must the court continue to pay attention to external validity, now that it has been created with a defined jurisdiction? Martti Koskenniemi provides a partial answer by describing the basic tension between the legal focus on individual responsibility in atrocity crimes and structural explanations.¹⁶ The determination of individual responsibility requires a context for evidence, and the contestation of context will generally proceed on the level of *framing*, rather than on the level of particular *facts*.¹⁷ Contesting the frame threatens to turn an atrocity trial into a circus (or at the least threatens to bring into focus the actions of the West in destabilizing the

¹³ This is perhaps the most significant difference from Gieryn's model. While boundary work in science attempts a clean separation between the natural and the social worlds, boundary work in the law requires some translation across the boundary. (For work that challenges the possibility of separation, see Latour, *infra* note 15.) The "gatekeeper" analogy in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993) may be helpful (as it suggests traffic passing through the gate and into the courtroom), but here the translation goes both ways.

¹⁴ This risks entering the once-vituperative debates about whether realism requires nihilism. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). I do not intend to re-engage with these now-stale arguments, except to note that even now there seems to be a presumption that any overt discussion of the social context of law threatens to unmoor the legal system.

¹⁵ See BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (Catherine Porter trans. 1993). Latour's argument is, at bottom, that the distinct categories of "society" and "nature" are generated through the work of "purification" — but that the proliferation of "hybrids" that cannot be neatly categorized (such as man-made environmental damage) suggests the need for an alternative ontology. My argument translates this into the legal context.

¹⁶ Martti Koskenniemi, *Between Impunity and Show Trials*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 12 (2002).

¹⁷ *Id.* at 14.

society in question¹⁸), but preventing the frame from being challenged raises the specter of the show trial.¹⁹ The internal operations of the court are not, and cannot be, totally insulated from the historical context. The question is not *whether* courts should be engaged in the process of writing history; it is *how* they should when they are forced to do so. “The engagement of a court with ‘truth’ and ‘memory’ is thus always an engagement with political antagonism, and nowhere more so than in dealing with events of wide-ranging international and moral significance,” he notes.²⁰ However, “no matter how much judges may seek to proceed in good faith towards their judgments, the context of the trial cannot — unlike the history seminar — be presumed to manifest good faith on everyone’s part. This is not a disinterested enquiry by a group of external observers but part of the history it seeks to interpret. Much is at stake for the protagonists — that is the nature of the trial — and no truth can remain sacred within it.”²¹

It is precisely because atrocity trials are, almost by definition, both politically charged and historically sensitive that the internal fairness of the legal process requires openness to external discourses.²² As this paper argues, the real action of an atrocity trial occurs at a level beyond bare facts, at the level of narrative and of networks of facts. At the same time, the broader social function of the trial depends on both the rigor and fairness of the process and whether its results withstand the scrutiny of an interested public.²³ The question then becomes

¹⁸ The role of the United States in Cambodia, for example, is incredibly complex: supporting the Lon Nol regime against the Khmer Rouge insurgents, then supporting the Khmer Rouge against the Vietnam-backed government, and finally, in the 21st century, leading the call for a tribunal. Similar circumstances surround, for example, the effort to bring Klaus Barbie to justice: Barbie had been protected by the United States for his work as an informant in Bolivia. See Alice Y. Kaplan, *Introduction* to ALAIN FINKIELKRAUT, REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY xxx–xxxii (Roxanne Lapidus trans., 1992). Note, too, that Jacques Vergès played a starring role in both the Barbie trial and in Case 002 at the ECCC, in which he is on the Khieu Samphan defense team. His “rupture” strategy operates at the fault line examined by Koskenniemi.

¹⁹ Koskenniemi, *supra* note 16, at 14.

²⁰ *Id.* at 25.

²¹ *Id.* at 25.

²² See Minow, *supra* note 11, at 126 (“It falls to grassroots and international groups of advocates and writers, paradoxically, to create demand and an appreciation for the ideal of legal responses to mass atrocity.”)

²³ See *id.* at 38–46.

how the court, through its handling of the historical context, can improve the internal and external validity of the proceedings.

The next two sections trace the creation of the ECCC as a legal space within the compromised politics and civil society of Cambodia. While this act of separation erected a boundary to protect the sanctified space of the court, the work of boundary drawing did not end there. The boundary has been continually reinforced and its precise location tweaked; it remains dynamic. The following two sections locate the boundary between the interior space of the court and the exterior space of Cambodian history. The two sections after that examine the forces that push against that boundary from each side.

II. The External Context: The Specters of Democratic Kampuchea Haunting Contemporary Cambodian Society

Negotiations regarding the establishment of a tribunal for Cambodia had occurred for years before the ultimate creation of the ECCC. The hybrid form of the tribunal reflects the context of these negotiations, which occurred against a backdrop of civil war that directly involved the Khmer Rouge. There is no simple way to separate the structure of the tribunal (and its rules and the selection of its personnel) from the contingencies of contemporary Cambodian history, or from the long attempt to come to terms with that history.

David Scheffer, the Ambassador for War Crimes at the State Department during the Clinton Administration, describes in his memoirs his negotiations with the Cambodian government.²⁴ In 1999, twenty years after the fall of Democratic Kampuchea, the U.N., with strong U.S. support, argued for the creation of a Chapter VII international tribunal, as had been

²⁴ See DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 341–405 (2012).

created to deal with the crimes in Yugoslavia and Rwanda.²⁵ When Prime Minister Hun Sen objected to a full U.N. tribunal, then-Senator John Kerry proposed a hybrid tribunal, with joint participation of Cambodian and U.N. staff.²⁶ But the devil was in the details. Hans Corell, the U.N. legal counsel, outlined a hybrid tribunal in which international judges would be in the majority, with conviction requiring a simple majority vote; Hun Sen demanded that a majority of the judges be Cambodian.²⁷ Confronted with this stalemate, Scheffer negotiated for a majority-Cambodian bench with a supermajority requirement for decisions, guaranteeing that neither side could reach judgment unilaterally.²⁸

In February 2002, confronted with what the U.N. saw as a compromised court structure, Hans Corell and Kofi Annan backed away from the negotiations. Corell said: “the United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality, and objectivity that a court established with the support of the United Nations must have. . . . [T]he United Nations . . . have decided, with regret, to end its participation in this process.”²⁹ Corell mentioned the likelihood that the tribunal would be “unable to produce a final judgment,” in the event that the accused all died before the trial’s end.³⁰ But negotiations resumed, and the Agreement between the United Nations and the Royal Government of Cambodia was signed in 2003 and ratified by the Cambodian National

²⁵ *See id.* at 381.

²⁶ *Id.* at 383.

²⁷ *Id.* at 384–385.

²⁸ *Id.* at 387–388.

²⁹ *Id.* at 401–402.

³⁰ *Cambodia: Ieng Sary Death Shows Khmer Rouge Court Failings*, HUMAN RIGHTS WATCH (March 14, 2013), available at <http://www.hrw.org/news/2013/03/14/cambodia-ieng-sary-death-shows-khmer-rouge-court-failings>.

Assembly in October 2004.³¹ In July 2006, the first staffers were sworn in, and the ECCC began its work.

Scheffer was motivated by reasons both legal and personal. The personal reasons include his own experience working in Southeast Asia in the late 1970s,³² as well as the history of American involvement in Cambodia; the United States spent years bombing Cambodia during the Vietnam War, and later continued to support the rump Khmer Rouge against the Vietnam-backed government.³³ But the push was also due to the recognition that a robust international criminal law had to be able to deal with the atrocities of Democratic Kampuchea.³⁴

This process was only possible because of Cambodia's political situation in the late '90s, as its civil war drew to a close. Ieng Sary was offered amnesty by King Sihanouk in 1996.³⁵ Pol Pot had died in the jungle in 1998, escaping judgment.³⁶ Nuon Chea and Khieu Samphan defected to the Cambodian government.³⁷ Ta Mok was captured in 1999.³⁸ The changing circumstances generated renewed interest in holding trials for the surviving members of the Khmer Rouge.

As a society that is still in transition, the scars of the past half century are in full view and inform every attempt to address the current human rights situation of Cambodia. The influence

³¹ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, June 6, 2003. Available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf.

³² See Scheffer, *supra* note 24, at 342.

³³ See *id.* at 342 ("a massive atrocity was occurring in my lifetime while the U.S. government largely ignored it. . . . I realized that 'never again' had been contradicted with profound ambivalence by the international community.").

³⁴ As Scheffer admits, "I could not rationalize building the other war crimes tribunals and then ignore a reckoning for the Khmer Rouge and their decimation of the Cambodian people. This sometimes did not sit well with major civil society groups and U.N. lawyers who were seeking a near-perfect model of justice and were prepared to abandon the endeavor, which both sometimes did." The recognition of these imperfections in the Cambodian model of justice are at the heart of the tribunal's current problems. See *id.* at 344.

³⁵ This amnesty was held not to bar Ieng Sary's prosecution in Case 002. See Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), Trial Chamber, Nov. 3, 2011, paras. 53–55.

³⁶ See Scheffer, *supra* note 24, at 359–360.

³⁷ See *id.* at 372.

³⁸ See *id.* at 379.

of history is not only experienced subconsciously (though, in the context of trauma, this is part of the equation as well³⁹); the historical fault lines continue to shape the events of the present day. It is precisely because the court is engaged in addressing this history that must be situated within its historical context. Because the court's efforts to explain and test historical evidence are what is at issue, the court must be understood as a participant in writing Cambodian history as well as a forum for the analysis of this history. The court's determinations of fact and of law will play a significant role in shaping the ongoing efforts to write and define Cambodian history.⁴⁰

A. History as a Weapon in Cambodian Politics

This issue is particularly salient in the context of Cambodia, because modern Cambodian history has generally been defined by outsiders. One of the claims of the Khmer Rouge was that they were allowing the history of Cambodia to be written by Cambodians for the first time.⁴¹ The history of Angkor, for example, was a product of the French, who sought to create a usable history for their Cambodian colony.⁴² The memory of Angkor, which was rejuvenated by the French, influenced the subsequent relationship between Cambodia and its neighbors, including Vietnam.

Cambodia was part of French Indochina, which included both Laos and Vietnam. The movement for Cambodian independence was sparked by the brief moment of freedom at the end

³⁹ See, for example, the work of the Transcultural Psychosocial Organization of Cambodia, <http://www.tpocambodia.org/>.

⁴⁰ See Part V, *infra*.

⁴¹ See DAVID CHANDLER, *Seeing Red: Perceptions of Cambodian History in Democratic Kampuchea*, in FACING THE CAMBODIAN PAST 233, 249 (1996) ("DK spokesmen frequently claimed that the revolution, by liberating ordinary people, enabled them at last to *write their own history*. Up to the colonial era, Cambodian history had been written by foreigners and by the wrong Cambodians. . . . pure Cambodian history was impossible to compose until the emergence of the CPK.").

⁴² See BENEDICT ANDERSON, IMAGINED COMMUNITIES 179–183 (1983). *But see* DAVID CHANDLER, *The Tragedy of Cambodian History Revisited*, in FACING THE CAMBODIAN PAST, *supra* note 41, at 310, 316 ("Over the next century or so French savants deciphered over a thousand Cambodian inscriptions, dated a similar number of ruins, and established the chronology of Cambodian history. At the same time, they felt obliged to tell the Khmer about their present-day helplessness and their long-term 'decline,' noting en passant that without the French the country would have disappeared. I have argued that giving Cambodian intellectuals (and semi-intellectuals, like Sihanouk, Lon Nol, and Pol Pot) a grandiose, unusable past produced among them a *folie de grandeur*.").

of World War II before the return of the French; David Chandler notes the rise in Cambodian membership in the Vietnamese-dominated Indo-China Communist Party in the late '40s.⁴³ The reliance of the Cambodian independence movement on support from both Thailand, and, increasingly, Vietnam, is somewhat ironic in light of the influence that those two countries have had over developments in Cambodia during the nineteenth and twentieth centuries.⁴⁴ However, for those Cambodians who challenged French rule, an alliance with the Vietnamese independence movement was necessary, even if independence risked being brought within the orbit of its larger neighbor.⁴⁵

This aspect of the history, while somewhat removed from the events of the 1970s, has a direct connection: the Communist Party of Kampuchea under Pol Pot defined itself in opposition to the general Indochinese communist party; battles over defining the anniversary of the founding of the party became a measure of loyalty, reading contributions to the struggle that occurred before the split out of the history of the CPK.⁴⁶ The government of the Vietnam-backed People's Republic of Kampuchea, the successor state to Democratic Kampuchea, reset the origin of the party to the earlier date.⁴⁷ One possible reading of the conflict between the Khmer Rouge and the Cambodian government post-'79 is as an internecine battle between factions of the Party.⁴⁸ Even today, the Vietnamese occupation is a sore spot for many Cambodians, and it is

⁴³ See DAVID CHANDLER, *The Kingdom of Kampuchea, March – October 1945*, in FACING THE CAMBODIAN PAST, *supra* note 41, at 165, 187.

⁴⁴ Chandler notes that one of the major reasons for Cambodia's problems is its relationship to Thailand and Vietnam: culturally closer to the Theravada Buddhist culture of Thailand, but with stronger commercial relations to Vietnam. The result has been see-sawing control of Cambodia between the two. See DAVID CHANDLER, *The Tragedy of Cambodian History*, in FACING THE CAMBODIAN PAST, *supra* note 41, at 297, 298.

⁴⁵ See DAVID CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY 47–61 (1991).

⁴⁶ See generally DAVID CHANDLER, *Revising the Past in Democratic Kampuchea: When Was the Birthday of the Party?*, in FACING THE CAMBODIAN PAST, *supra* note 41, at 215.

⁴⁷ See *id.* at 232.

⁴⁸ This interpretation courtesy of Jasper Pauw, former defense counsel for Nuon Chea. Jasper Pauw, interview with author, Jan. 11, 2013, Phnom Penh, Cambodia.

impossible to fully separate the current regime's history with Vietnam from the content of the trials.⁴⁹ The question of continuity or rupture remains both live and material.

The Vietnamese quickly sought to explain the history of the 1970s as a way of addressing the appalling conditions in Cambodia and securing their own legitimacy. A mere day after taking Phnom Penh, the government of the People's Republic of Kampuchea created the People's Revolutionary Tribunal to try Pol Pot and Ieng Sary *in absentia*.⁵⁰ The judgments were a foregone conclusion, but they did assemble important evidence and identify witnesses who continue to testify in the current trials.⁵¹ The judgment required placing all blame on the "Pol Pot-Ieng Sary clique" rather than looking deeply across Cambodian society.⁵²

The Vietnamese also established the museum at Tuol Sleng, the site of the infamous S-21 prison, where Khmer Rouge cadres suspected of being enemies had been sent.⁵³ Mai Lam, a Vietnamese colonel who had organized the Museum of American War Crimes in Ho Chi Minh City, was fluent in Khmer, and had legal training, designed the museum, as well as the memorial stupa at Choeung Ek, S-21's killing field.⁵⁴ Mai Lam drew upon the models of memorializing Auschwitz, despite the important differences between the concentration camps in which the Nazis imprisoned and executed Jews, and the prison where the Khmer Rouge sent its internal

⁴⁹ The complexity of celebrating the "Victory over Genocide" holiday, which necessarily involves the Vietnamese occupation, was mentioned by Robert Finch, legal adviser at the Cambodian Center for Human Rights. Robert Finch, interview with author, Jan. 9, 2013, Phnom Penh, Cambodia.

⁵⁰ Decree Law No. 1: Establishment of People's Revolutionary Tribunal, Jan. 8, 1979, available at http://law.scu.edu/site/beth-van-schaack/File/Decree_Law_No._1.pdf.

⁵¹ See, e.g., Denise Affonço's testimony, Transcript of Case 002 Trial Day 139, Dec. 12, 2012.

⁵² See Howard J. De Nike, *Reflections of a Legal Anthropologist on the Trial of Pol Pot and Ieng Sary*, in GENOCIDE IN CAMBODIA 19, 24 (Howard J. De Nike, John Quigley, and Kenneth J. Robinson, eds., 2000) ("[T]he prosecution takes on added symbolic weight in the effort of the new government's leadership, some of whom were themselves former Khmer Rouge members, to separate the emergent, 'authentically Khmer,' People's Republic of Kampuchea from the prior regime. It is renegade Pol Pot and Ieng Sary who have bartered Cambodian patrimony for Maoist cultural revolution.").

⁵³ See DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON 5 (1999).

⁵⁴ See *id.* at 4–8.

enemies.⁵⁵ It is important to note that while the Vietnamese were quite interested in shaping the history of Democratic Kampuchea in order both to legitimate their own involvement and to understand how this revolution differed so strikingly from their own, there are no indications that this involved actively distorting the record. Nevertheless, the role of the Vietnamese (as interested parties with a complex relationship with Cambodia) in defining the history of DK has been raised by the defense as being potentially relevant.⁵⁶

Throughout this period, participants in civil society and in academia have been involved in documenting and analyzing the events of Democratic Kampuchea. This work has involved recording the statements of refugees and of interviewing victims, perpetrators, and bystanders alike. It has also involved collecting primary documents and the writing historical accounts that begin to make sense of the events.⁵⁷

The individuals engaged in documentation have had a variety of motivations for their work, arising out of both the Cold War context of Communist movements in Southeast Asia and the global human rights context that grew to prominence in the 1970s.⁵⁸ Individuals had their own idiosyncratic reasons for interest in Cambodia, as well as the more systemic/structural reasons. Within the small circle of Cambodia specialists, the domains of the personal and the professional are never entirely distinct.

⁵⁵ See *id.* at 7–9.

⁵⁶ See Part IV, *infra*.

⁵⁷ For the importance of refugee interviews as a source of knowledge about the regime, see generally DAVID CHANDLER, *Transformation in Cambodia*, in FACING THE CAMBODIAN PAST, *supra* note 41, at 207. See also BEN KIERNAN, *Reports from the Thai-Cambodian Border, 1979*, in GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA, 285.

⁵⁸ Consider David Chandler's reflection on his 1977 essay, "Transformation in Cambodia," which he now views as "a naïve, unduly optimistic assessment of the Cambodian revolution" that "reflects views that were widely held in 'anti-anti-Communist' academic circles in the backwash of the Vietnam War." DAVID CHANDLER, FACING THE CAMBODIAN PAST, *supra* note 41, at 205. See also Ben Kiernan's reassessment in 1979: "Support for the Pol Pot regime may or may not be deemed logical from deductive argument concerning its 'struggle for independence.' But what might give such argument credibility, a detailed convincing analysis showing the regime's internal policy to have served the interests of the Kampuchean workers and peasants, is still lacking. And having talked at length with workers and peasants who lived in many provinces of Kampuchea under Pol Pot through 1977–1978, I am certain it will never be produced." BEN KIERNAN, *Grappling with Genocide, 1978–1979*, in GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA, *supra* note 57, at 203, 210–211.

Eventually, by the 1990s, the Documentation Center of Cambodia (DC-Cam) had become established as the center for scholarly work and archival collections relating to the period of Democratic Kampuchea. In the decades before prosecution became possible, the people at DC-Cam worked to understand the events of '75–'79, with the understanding that criminal cases could someday be brought.⁵⁹ But, given the uncertainty of trials ever occurring, the work of the Center had to fulfill more immediate goals. Inevitably, it was subject to the same political debates (domestic and international) that plagued Cambodia.

Ben Kiernan, who founded the Cambodian Genocide Program at Yale University, and was closely tied to DC-Cam, documents the challenges to the operations of these two institutions. One such challenger, Stephen J. Morris of the *Wall Street Journal*, had supported the Khmer Rouge (which he described as “anti-Communist”) during the period of their opposition to the Vietnam-led PRK.⁶⁰ Morris’s accusations that the CGP was a hotbed of Marxism foundered in the press, but were continued in the Senate by Bob Dole, Trent Lott, and Jesse Helms.⁶¹ The resulting alignments took on a curious character: the Cold War alliance of the Khmer Rouge with China and the United States against the Vietnam-USSR-PRK “often brought together conservative anti-communists and Maoist radicals. . . . Priorities for members of this coalition usually included disguising their own past support for the Khmer Rouge, burying the history of the Vietnam War, and yet refighting it by both covering for the Khmer Rouge and fanning the flames of the MIA issue.”⁶² The ECCC has stepped into this treacherous and deeply politicized engagement with the past. One hope of its creators is that its legal formality can create some

⁵⁹ See Youk Chhang, *Foreword to the Second Edition* of STEPHEN HEDER AND BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (2004).

⁶⁰ See BEN KIERNAN, *Bringing the Khmer Rouge to Justice*, in GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA, *supra* note 57, at 221, 231.

⁶¹ See *id.* at 232–233.

⁶² *Id.* at 237.

breathing room within this toxic brew. But it may be naïve to believe that it can emerge from this without being sullied.

B. The Permanence of War

The civil war, which continued into the '90s, was a continuation of conflict that had persisted throughout the Cold War. When the North Vietnamese used eastern Cambodia (the parts of the country that were under partial control by the Khmer Rouge) as a refuge, the United States initiated a bombing campaign; after King Sihanouk was overthrown, the United States threw its support behind the corrupt and ineffective Lon Nol regime.⁶³ Cambodia's domestic politics was subject to the complex geopolitical maneuverings of the United States, China, and the U.S.S.R.

By the mid-1970s there was a full-fledged civil war between the Lon Nol regime in Phnom Penh, supported by the United States, and the Khmer Rouge in the countryside. The Lon Nol government was hardly a model regime, often incompetent or worse.⁶⁴ The bombing of the countryside continued in order to influence the direction of the civil war, even as conditions in the capital deteriorated in the ensuing refugee crisis.⁶⁵ The importance of the civil war in shaping the Khmer Rouge approach to armed conflict and to the residents of Phnom Penh is yet another contested issue in understanding the role of history.

In 1979 the Vietnamese government overthrew the Khmer Rouge, replacing the government with one led by Heng Samrin, a former Khmer Rouge leader from the East Zone who had fled to Vietnam during the purge of that region.⁶⁶ The Vietnamese rule was complicated

⁶³ See CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY*, *supra* note 45, at 192–235.

⁶⁴ See ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION* 114–161 (1998).

⁶⁵ See *id.* at 147–153.

⁶⁶ See Kiernan's 1991 and 1992 interviews with Heng Samrin and Chea Sim in BEN KIERNAN, *Rebel Revolutionaries: Interviews with Chea Sim and Heng Samrin*, in *GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA*, *supra* note 57, at 59.

for Cambodians, who were happy that the rule of the Khmer Rouge was over, but resented the occupation and influence of the Vietnamese.⁶⁷ The Vietnamese sought to legitimate their intervention in Cambodia by pointing to the crimes of the Khmer Rouge — while ignoring the Khmer Rouge backgrounds of PRK leaders, such as Heng Samrin, or getting mired in the problem of addressing low-level participation in the revolution and the crimes committed by ordinary Cambodians.

Following a period in which Cambodia was under the United Nations Transitional Authority in Cambodia (UNTAC), Hun Sen has remained firmly in power. During his rule, the remnants of the Khmer Rouge have put down their weapons, due in part to an amnesty that he offered them.⁶⁸ The delicacy of the situation prevented Hun Sen from pushing too hard on the Khmer Rouge, but eventually he agreed to the creation of a hybrid tribunal to try crimes from Democratic Kampuchea.

The treatment of the Democratic Kampuchea era remains a touchstone for legitimacy in Cambodia, and the memory of this period continues to be hotly contested.⁶⁹ The PRK, seeking to establish their own legitimacy, created institutions for preserving the memory of the horrors of Democratic Kampuchea, and placing blame on the “Pol Pot-Ieng Sary clique,” while also instituting holidays commemorating the “Day of Hatred” and the “Victory over Genocide Day.”⁷⁰ Despite the horror of Democratic Kampuchea, the fact of Vietnamese support for the CPP has created space for alternative, revisionist narratives: a 1994 radio broadcast by the Khmer Rouge declared that the skeletons at Tuol Sleng “are purely and simply part of the

⁶⁷ See BEN KIERNAN, *War and Peace in Post-Genocide Cambodia*, in GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA, *supra* note 58, at 305, 305–327.

⁶⁸ See Scheffer, *supra* note 24, at 372–374.

⁶⁹ See Alex L. Hinton, *Truth, Representation and the Politics of Memory after Genocide*, in PEOPLE OF VIRTUE: RECONFIGURING RELIGION, POWER AND MORALITY IN CAMBODIA TODAY 62, 66–69 (Alexandra Kent and David Chandler eds., 2009).

⁷⁰ See CHANDLER, VOICES FROM S-21, *supra* note 53, at 9–10.

psychological war waged by Vietnam in its aggression against Cambodia . . . part of a psychological propaganda campaign to legalize their aggression against and occupation of Cambodia.”⁷¹ The elements of the Cambodian past, while not directly part of the current Khmer Rouge trials, nevertheless continue to shape events. Disputes over the specific crimes of Democratic Kampuchea are interpreted through the tumult of the past half century. Concepts such as responsibility and necessity derive their meaning from this background. And even if the ECCC only began investigating these matters in the 21st century, other actors have been involved in shaping this background over the years.

The negotiations between the United Nations and the governments of the United States and Cambodia occurred in this context. The history of American involvement in Cambodia influenced its determination to push for the tribunal, and the bargaining position of the parties was directly shaped by the contingent history of the civil war and of Hun Sen’s consolidation of power. Creating an international court offered the possibility of addressing this messy history through the formality of legal process, as distinguished from the bloody fighting that had raged for the past half-century.

III. The Internal Context: Divergent Approaches to Narrow Temporal Jurisdiction

The court faces another set of challenges within the space of the courtroom. Some difficulties arise from its narrow jurisdiction and the endless battles to define the scope of events at issue. Other difficulties arise from the persistent threat of political interference, magnified by the court’s hybrid structure. For the court to maintain the requisite adherence to legal norms, it must resolve these internal challenges in accordance with standard fair trial principles. The challenge of internal validity must be solved within the space that has been addressed by most legal scholarship concerning the ECCC. This section will therefore be brief.

⁷¹ 16 December 1994 broadcast, *reprinted in* Hinton, *supra* note 69, at 75.

The court exists as a space for law within a highly charged domain of social meaning and political contestation. While the requirement of legal process necessitates imposing narrow constraints on the scope of the court's activities, the court also cannot make those boundaries too rigid and impermeable; it is inevitably drawn into these larger questions.⁷²

There are two divergent approaches to addressing the scope of the court's jurisdiction. The Nuon Chea team has suggested that many issues that are considered external to the case should be brought within it — and that the failure to so enlarge the trial undermines it. The Ieng Sary team, by contrast, has tried to draw out the complexity of particular issues deemed within the purview of the court, in order to drive them out. Because this approach deals more with the evidence that is introduced into the court, it is addressed in the next section.⁷³ This section instead focuses on the framing issues raised by the Nuon Chea defense.

While the trial chamber tacitly acknowledges the contextual elements, this does not translate into an explicit willingness to consider the effects of the context on the internal operations of the court in all matters. The Nuon Chea team has been particularly engaged in raising the issues of context in interesting ways. Their approach essentially boils down to an attempt to bring in the broader context of American bombing and the Vietnamese occupation — issues that the Trial Chamber repeatedly deems to be outside the jurisdiction of the court and therefore inadmissible.⁷⁴ However, the argument of the Nuon Chea team is not only that these seemingly external events are necessary to understand the events on trial; it is that these events

⁷² See the discussion at note 139, *infra*.

⁷³ See note 106, *infra*.

⁷⁴ *But see* Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 336 (2008) (“Even when its limits are considerably enlarged, as they are by the definition of international crimes, matters important to a full historical account still remain legally irrelevant. In explaining what happened in Rwanda or the former Yugoslavia, for example, legal relevancy restrains judges from embarking on an exploration of the role played by the U.N. and foreign states in these tragic events — even if causal links between foreign conduct and triable offenses are probable.”).

color the interpretation of the facts and are always already present inside the courtroom.⁷⁵

Bringing them into the courtroom would enable them to be tested and examined rather than haunting the proceedings without being fully acknowledged.⁷⁶

The strategy of the Nuon Chea team raises the question of who gets to define the interior space of the courtroom. By repeatedly challenging the limitations imposed by the trial chamber, the defense team earned a sanction; but the extent of the disputes between the team and the judges was used to suggest judicial impropriety and bias.⁷⁷

The trial chamber's decisions about what to let into the courtroom define the grounds of legal argument. While the trial chamber has been willing to address the context of the '75–'79 period (by allowing some discussions of the baseline situation in the early '70s and the creation of the CPK), it has been unwilling to address the issue of historical narrative: how the events of the DK period have been refracted through the subsequent history of Cambodia.

The refusal to consider these elements weakens the roots that bind the court to the soil of Cambodian society. For even if the court takes a naïve view of how narrative operates, outside analysts of the court's role in Cambodia (including historians and social theorists) may not be so

⁷⁵ See Michiel Pestman, Nuon Chea Defense Team Response to Opening Statement by the Prosecutor, Nov. 23, 2011, available at http://www.cambodiatribunal.org/sites/default/files/documents/E146.1_EN.pdf (“This trial will be like a play — or a film — with an incomplete cast, a mini-cast. Some of the major actors will be conspicuously absent. And the result will be a *partial* account.”).

⁷⁶ After noting that “this court needs a jester,” Pestman raised the specter of the 1979 *in absentia* trial — a point his colleague Andrew Ianuzzi explicitly returned to during the trial: “are you aware, Mr. Witness, that at . . . the Chaktomuk theatre, the PRK orchestrated a trial, in absentia of Pol Pot and Ieng Sary? . . . are you aware that this building is a copy . . . of the Chaktomuk theatre, where that circus and political show trial were held?” See Ianuzzi, Transcript of Case 002 Trial Day 61, May 17, 2012, at p. 63, ll. 9–20. Pestman observed how “the role of court jester is, of course, an ambiguous one. With his presence the jester also legitimizes and eventually perpetuates the very system he ridicules. I realize my presence here will be used by others . . . to argue that this is a properly functioning court, which it is not.” Pestman, Nuon Chea Response to Opening Statement, note 75, *supra*.

⁷⁷ See Anne Heindel's commentary on “Decision on Nuon Chea Defense Counsel Misconduct,” July 1, 2012, available at <http://www.cambodiatribunal.org/sites/default/files/commentary-pdfs/CTM%20Heindel%2012-07-01%20AH.pdf>.

quick to reject this fundamental aspect of the court's situation. The refusal to be reflexive in a complex legal context simply undermines the notion of legitimacy.⁷⁸

Of course, the maintenance of the interior space of the law serves some essential functions. One of the major challenges of the court is to protect the integrity of the legal proceedings against a background of political interference. Consider the Nuon Chea team's argument that Hun Sen's public statements calling their client a murderer violated his fair trial rights.⁷⁹ The Trial Chamber declined to take action against Hun Sen, a decision later affirmed by the Supreme Court Chamber (SCC).⁸⁰ The SCC argued that there was no legal basis for taking action, and that the proper remedy was to reaffirm that public statements would have no bearing on the judgment. The effect of these decisions was to heighten the court's commitment to exclude potentially dangerous external statements. It is possible that the reaction against the expansion of historical context is a reflection of these concerns about interference.⁸¹

However, the court is weakened by its simplistic treatment of history and by its refusal to engage with the factors that mark its unique context. The façade that this is an ordinary court, in which the internal legal mechanisms can be treated with minimal reference to the external concerns about truth, justice, and Cambodian society, undermines its objectivity. The situation calls for a frank acknowledgement of the context, of what makes these chambers "extraordinary." It is no concession to relativism to locate this court as a particular implementation of some mechanism of justice with universal aspiration. The court already operates to construct and

⁷⁸ See *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE 20 (February 2012) ("While the Trial Chamber must provide some boundaries to the scope of questioning, and therefore, the trial, Trial Chamber President Nil Nonn's approach to this questioning has appeared reactive.").

⁷⁹ Application for Summary Action against Hun Sen Pursuant to Rule 35, Feb. 12, 2012.

⁸⁰ Decision on Rule 35 Applications for Summary Action, ECCC Trial Chamber, May 11, 2012; Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, ECCC Supreme Court Chamber, Sept. 14, 2012.

⁸¹ For more on this point, see p. 52.

defend a boundary between the internal space of law and the external demands of a complex society; it must be analyzed from within that understanding. The particularities of the historical situation can only serve as a means to discredit the court if they go unacknowledged and are swept under the carpet. Acknowledging that the operations of a court in Cambodia must necessarily deviate from the ideal (unattainable even in the most sophisticated legal systems) allows us to analyze its form of justice, free from preconceptions.

IV. Bringing the Outside In: The Role of Historical Evidence and Expert Historians

If we wish to understand the court's operations in terms of demarcating the boundary between *internal* conceptions of *legality* and *external* conceptions of *justice*, we must examine the bi-directional traffic across the boundary. The court adjusts the boundary to bring in historical expertise and contextual evidence that does not strictly fall within its jurisdiction, and the larger society draws lessons regarding the process of reconciliation from the decisions of the court. The boundary only comes into focus through the continual contestation of the parties and through the larger efforts to articulate what the court is doing; the boundary has no form independent of the actual experience of the court. Formally, the court's jurisdiction marks out where the boundary is — the court only can deal with crimes from 1975–1979, and only has jurisdiction over the senior leaders and those most responsible.⁸² These terms are contested, however, and history plays an important role in defining them. But the use of history raises questions about the nature of the court's evidence.

A. DC-Cam: Accountability and the Archive

A unique feature of the ECCC is that much of the documentary evidence comes from a single institution, the Documentation Center of Cambodia (DC-Cam). Its role has therefore been

⁸² The Supreme Court Chamber has held that the terms “senior leadership” and “most responsible” are guidance on prosecutorial policy rather than strict jurisdictional limits. *See* Case 001 Appeal Judgment, ECCC Supreme Court Chamber, Feb. 3, 2012, at para. 79.

subject to examination by the court. This relates primarily to the immediate questions of the chain-of-custody and authentication of documents, but also the extent to which the processes of writing the history of Democratic Kampuchea, preserving the memory of the crimes committed within it, and beginning to think through the question of accountability have been examined over several decades by independent actors. DC-Cam’s director, Youk Chhang, explained how it grew out of earlier efforts by lawyers and historians, supported by groups such as the National Endowment for Democracy.⁸³

He described three objectives for DC-Cam: studying history to promote national reconciliation (including the creation of “an independent court to ascertain the truth of what happened in the past.”); teaching the history of Democratic Kampuchea to schoolchildren and the public; and creating a research center for the future study of Cambodia.⁸⁴ If, today, the ECCC represents the focal point of legal efforts to address the crimes of Democratic Kampuchea, DC-Cam remains the focal point for scholarly attention on the topic. The ECCC and DC-Cam function as two clusters of activity, their work closely related but always necessarily remaining distinct.

DC-Cam was created in the context of Cambodia’s inability to prosecute the crimes of Democratic Kampuchea. Chhang recounted an exchange with an Australian prosecutor about how to bring accountability for the crimes of the DK era, in which he was told to “wait until the Court is actually established.” He described his response: “How can we wait anymore? Because we have been waiting for many years already.”⁸⁵ Chhang and others who wanted justice and accountability could not wait for the creation of a court if they wanted to move forward. The delay in creating a court meant that other vehicles for determining truth and accountability had to

⁸³ Youk Chhang testimony, Transcript of Case 002 Trial Day 25, Feb. 1, 2012, p. 11, l. 16–p. 12, l. 10.

⁸⁴ Chhang testimony, Transcript of Trial Day 25, at p. 14, ll. 5–15.

⁸⁵ Chhang testimony, Transcript of Trial Day 25, at p. 23, ll. 1–4.

be used instead; the subsequent creation of the court occurred within a legal space that had become accustomed to its absence, but that nevertheless had always been directed toward the possibility of its creation. DC-Cam occupied a very particular role in Cambodian civil society: not part of the judicial system, but existing in its shadow.

In pursuing these alternative measures, Chhang considered the possibility of advocating for a Truth Commission, but ultimately he did not believe that this was an appropriate fit with Cambodian culture and norms of justice.⁸⁶ Instead, DC-Cam's work focused on a series of interviews with people throughout Cambodian society: encouraging them to tell their stories without any formal legal consequences. These constitute some of the richest sources of oral history from this period, and make an interesting counterpoint to the interviews conducted by the ECCC's Office of Co-Investigating Judges.⁸⁷

Given the motivations for the creation of DC-Cam, its neutrality has been challenged by some of the defense teams. But there are complications: raising the issue of the organization's mission risks opening up discussions about its broader goals. When Pich Ang, for the civil parties, asked about the mission of DC-Cam, Ieng Sary's international counsel, Michael Karnavas, objected: "He's here to give evidence as to how the documents are collected, stored, categorized, and used. That's the whole purpose, not for civil parties to give a venue to the director to talk about reconciliation, all these grand issues and aspirations that we all agree are noble."⁸⁸ Lead international lawyer for the civil parties, Elisabeth Simonneau-Fort, then asked directly whether the broader mission affected the reliability of DC-Cam's archival practices:

⁸⁶ Chhang testimony, Transcript of Trial Day 25, at p. 23, ll. 8–15; Youk Chhang, interview with author, Jan. 10, 2013, Phnom Penh. He described the problem with Truth Commissions as being that they relied on a notion of forgiveness that was too particular to societies steeped in Christianity, and inapplicable to the predominantly Buddhist culture of Cambodia.

⁸⁷ The contrast between the depth of the DC-Cam interviews and those of the OCIJ was pointed out in Tarik Abdulhak, interview with author, Jan. 22, 2013, Phnom Penh, Cambodia.

⁸⁸ Chhang testimony, Transcript of Trial Day 25, at p. 101, ll. 14–18.

“you’re engaged in the struggle against impunity, crimes against humanity, and crimes of genocide. . . . would this commitments [sic] force you to make any breaches in the ethical manner in which you carry out your work?”⁸⁹ Chhang denied this possibility.

DC-Cam’s important role in building the factual record for the tribunal had to be read against the similar role played by judicial investigators. As Chhang explained, “No laws stipulate that the word ‘investigate’ is only for the Court. I can be seen as I was investigating [sic], but it may not mean in a legal sense.”⁹⁰ Judge Lavergne distinguished between “the research that is conducted by DC-Cam” that is “of great interest for historical — for academic reasons” from “the documents that are part and parcel of these judicial proceedings.”⁹¹ The problem, as Khieu Samphan’s international counsel, Arthur Vercken, noted, was that “we have an organization . . . that carries out its own and proper activities,” but, according to the defense, “the Prosecution has taken for granted the value of those documents, integrated them directly into the case file . . . This is exactly why the two issues [academic and judicial] that you have just raised are intrinsically related.”⁹² This defense team disputed the notion that the quality of the documents could be divorced from the context in which they were collected. This has further salience given the myriad problems identified with the interviews of the Office of Co-Investigating Judges.⁹³

The questioning also turned on the meaning of the word “evidence” — whether the process of collecting documentary information about the Khmer Rouge constituted an effort to collect legal evidence. As with the word “investigation,” Chhang stated that he was not using the word in any technical, legal sense: “I’m saying here that law does not monopolize the word — the use of the word ‘evidence.’ For me, coming from a social science background, we use this

⁸⁹ Chhang testimony, Transcript of Trial Day 25, at p. 116, ll. 8–14.

⁹⁰ Chhang testimony, Transcript of Trial Day 25, at p. 102, ll. 23–25.

⁹¹ Youk Chhang testimony, Transcript of Case 002 Trial Day 26, Feb. 2, 2012, at p. 7, ll. 20–24.

⁹² Chhang testimony, Transcript of Trial Day 26, at p. 8, ll. 8–14.

⁹³ See note 87, *supra*.

word for the purpose of our research because we want to know what happened in the history.”⁹⁴

This exchange highlights the tension in understanding the role of DC-Cam and the historians affiliated with it: they constructed their histories of the period for purposes that were distinct from (if related to) the legal machinery of the court. The investigative process should have created a record in which all procedural safeguards were met, but there are questions as to whether this actually occurred. As Lavergne’s question suggested, in ordinary legal practice, questions about an organization’s overall goals may be secondary, and distinguishable, from the question of document authenticity. But, given its politicization and unique historical context, this is not an ordinary legal setting, and the origin of documents cannot be so easily divorced from the overall mission of the archive.

As noted above, the failure to establish a court sooner meant that DC-Cam had no real alternative but to construct a record independently, and its archive has been a crucial source of documentation for the entire Democratic Kampuchea period. However, DC-Cam’s projects were not legal investigations and were not conducted according to that standard. While the formal investigation through the Office of Co-Investigative Judges (OCIJ) was designed to create a record in accordance with legal principles, a major point of concern for the defense has been the relationships among the various stages in this process. To the extent that either the Prosecution or the investigating judges have been influenced by the pre-existing framework of accountability for the crimes of Democratic Kampuchea, how are we to understand this organization’s role?⁹⁵

The Nuon Chea defense team elaborated on this by asking about the “invisible archive” — the documents that have not been collected and that have therefore been omitted from the

⁹⁴ Chhang testimony, Transcript of Trial Day 26, at p. 85, ll. 21–25.

⁹⁵ However, Tarik Abdulhak, the prosecuting attorney who questioned Youk Chhang, observed that the relationship between OCIJ and DC-Cam was, if anything, more distant than it should have been. In his description, OCIJ insisted on redoing work that had been done previously (and better) by DC-Cam. Tarik Abdulhak, interview with author, Jan. 22, 2013, Phnom Penh, Cambodia.

record. Said Jasper Pauw, “We cannot limit ourselves to just discussing the documents that have been found and that have been transferred; we need to also discuss what documents have not been looked for, have not been collected or, possibly, have not been transferred.”⁹⁶ Pauw raised the question of whether the interest in preparing files for future prosecutions undermined the neutrality of the process through which documents were collected.⁹⁷ The implication of this line of questioning was that the actions of DC-Cam during the years before the trial may have influenced the contents of this repository.

The prosecution objected to this line of questioning, arguing that these contextual matters were irrelevant to the issues of document authentication.⁹⁸ But while the suggestion that the archival record was actively shaped to lead to certain legal results has no evidentiary support, the more abstract question retains its force: that the formal investigation was built upon a pre-existing foundation of documents and historical arguments that was not, itself, subject to judicial supervision. The question of how to define this starting point may be relevant without presuming any bad faith on the part of any actors inside or outside of the court.

The Nuon Chea defense brought up an email from historian Steve Heder on this issue, stating “I believe it was wrong for DC-Cam to have become involved in attempting to define and prejudice the scope of potential prosecutions . . . it appears to tie DC-Cam to a politically-driven agenda that directs and limits the search.”⁹⁹ In response, Judge Cartwright noted that the Trial Chamber “fully understands” the reasons for asking about this issue, but ruled the questioning out of bounds.¹⁰⁰ The judges seem to recognize the defense’s point that the role of DC-Cam in the process of creating the primary evidentiary record is a legitimate concern, even as it denied

⁹⁶ Chhang testimony, Transcript of Trial Day 26, at p. 67, ll. 18–22.

⁹⁷ See Chhang testimony, Transcript of Trial Day 26, at p. 76.

⁹⁸ See Chhang testimony, Transcript of Trial Day 26, at p. 105.

⁹⁹ Chhang testimony, Transcript of Trial Day 26, p. 107, ll. 11–14, 19–22.

¹⁰⁰ Chhang testimony, Transcript of Trial Day 26, p. 111, ll. 23–24.

that this was the proper place for those questions. I suggest that this is best understood in terms of the internal/external boundary: DC-Cam's role from a purely internal perspective is as a link in the chain of custody of the documents, and it is examined on those terms. The question of how the organization's mission may have indirectly influenced the contents is ruled out. This makes sense, given that the defense has been unable to offer any specific evidence on this point; the influence of the Vietnamese occupation and private opinions about this or that defendant are presumptively without effect.¹⁰¹

But this also misses something: DC-Cam is not only a link in the chain of custody; it has served as the focal point for non-judicial investigations into Democratic Kampuchea. It is, in a sense, the negative image of the court.¹⁰² And while the issue of document authentication is important, the influence of DC-Cam extends beyond its role as a custodian of records to its role as the leading civil society institution engaged in the process of writing the history of the period. Questions about culling the record or prejudicing document collection are both speculative and beside the point; the issue of the degree to which individuals affiliated with DC-Cam acted in a legal sense concerns the extent to which the court can be seen to exist as a fully independent institution. As Heder recognized, given the political stakes of the prosecutions, the construction of the legal case had to be sharply distinguished from non-judicial analyses. This is somewhat ironic, given that Heder had previously written a book entitled "Seven Candidates for Prosecution," which had been published by DC-Cam.¹⁰³ That is, the value of the court is to create the breathing room that comes from moving the trial from the realm of combative politics

¹⁰¹ See the objection of Tarik Abdulhak for the Prosecution at Transcript of Case 002 Trial Day 27, Feb. 6, 2012, p. 85, ll. 10–15, arguing that documents need only meet "prima facie standards of relevance, reliability, and authenticity" unless there are indications that documents are either forged or unrepresentative. Abdulhak continued to note that "a wide-ranging inquiry into documents" is neither necessary nor in accordance with the trial chamber's practice. *See id.* at ll. 19–22.

¹⁰² "Negative image" in the photographic sense, not in any normative sense.

¹⁰³ *See* Heder, *supra* note 59.

(which, in Cambodia, can involve rockets and grenades) to that of the ritualized combat of judicial process. Precisely because the cases could never be insulated from the larger concerns of Cambodian society, the boundary between historical investigation and legal investigation had to be maintained as sharply as possible. Precisely because the question of DC-Cam's role remains so foundational, such questions could never be posed within the courtroom.

B. The Atrocity Experts: Historians as Expert Witnesses

When historian David Chandler testified in Case 002, his testimony largely concerned the issue of how the policies that were described in documents from Democratic Kampuchea translated into actual practices.¹⁰⁴ However, it was clear throughout the questioning that some of the approaches taken by Chandler in the course of his research fit uncomfortably within the evidentiary framework of the court. He described his research agenda as being “as open and fair to the evidence as I could be and . . . to consult as many kinds of evidence as I could to widen my understanding and to clarify facts.”¹⁰⁵ A few challenges were raised, particularly concerning the distance between evidentiary norms in history writing and in a criminal trial. Karnavas repeatedly challenged Chandler on the sources of his assertions, flagging several instances in which Chandler made an assumption about the state of mind of Pol Pot.¹⁰⁶ As Chandler noted, he was faced with instances in which there simply was no documentary source on point, but the obligation to write a narrative and to make sense of the past involved taking leaps that were not strictly compelled by the evidence. However, in the space of criminal prosecution, the evidence must be addressed to issues that can be proven, and to ensuring that these elements correspond to the elements of the charged crime. Understanding, in the broader sense, is unnecessary and may

¹⁰⁴ See, e.g., David Chandler's testimony, Case 002 Trial Day 79, July 18, 2012, p. 35.

¹⁰⁵ Chandler, Transcript of Trial Day 79, p. 53, ll. 6–8.

¹⁰⁶ See David Chandler, Transcript of Case 002 Trial Day 82, July 23, 2012, p. 140, ll. 22–25; p. 143, ll. 15–19. See the discussion at note 73, *supra*.

even be counterproductive.¹⁰⁷ Thus, while the insistence of the defense counsel on footnotes and citations was clearly frustrating, and appeared irrelevant to the substance of Chandler's testimony,¹⁰⁸ these issues went to the difference between the historian's task of explaining and understanding the past (with the possibility that his or her explanations will later be shown to be wrong) and the prosecution's burden of building an air-tight case in which every element of the crime is proven.¹⁰⁹

Chandler's testimony revealed the process of how an academic historian began explaining the events of Democratic Kampuchea. He started his investigations with a series of refugee interviews, attempting to write a tentative explanation of events in Cambodia from these partial accounts.¹¹⁰ He acknowledged the uncertainty of the conclusions and began posing hypotheses, collecting information, and proposing an agenda for future research. This is essentially an inversion of the legal process, in which arguments are directed toward a particular conclusion, following the culmination of a thorough investigation.¹¹¹ At times it was suggested that his interviews and factual sources were directed to certain ends, a suggestion that he

¹⁰⁷ On the distinction between "judging" and "understanding," see CARLO GINZBURG, *IL GIUDICE E LO STORICO: CONSIDERAZIONI IN MARGINE AL PROCESSO SOFRI* 109–110 (1991) ("Le strade del giudice e quelle dello storico, coincidenti per un tratto, divergono poi inevitabilmente. Chi tenta di ridurre lo storico a giudice semplifica e impoverisce la conoscenza storiografica; ma chi tenta di ridurre il giudice a storico inquina irrimediabilmente l'esercizio della giustizia." ("The paths of the judge and that of the historian coincide for a while but inevitably diverge. He who tries to reduce the historian to a judge simplifies and impoverishes historical knowledge; but he who tries to reduce the judge to an historian irreversibly taints the exercise of justice.")). See also Carlo Ginsburg, *Checking the Evidence: The Judge and the Historian*, 18 *CRITICAL INQUIRY* 79, 82 (1991) ("Not surprisingly, in Bloch's unfinished book on historical method we find the following ironical utterance: 'Robespierrists! Anti-Robespierrists! For pity's sake, simply tell us what Robespierre was.' Being confronted with the dilemma 'Judging or Understanding,' Bloch chose unhesitatingly the latter.") (quoting MARC BLOCH, *THE HISTORIAN'S CRAFT* 140 (Peter Putnam trans., 1953)). Replace "Robespierre" with "Pol Pot" for a sense of the problems with the testimony.

¹⁰⁸ See, e.g., Chandler, Transcript of Trial Day 79, p. 130, ll. 11–16 ("when a question comes out from somewhere — 'where did you get your answer?' — I mean, that's going to be hard to say, unless the question is given to me in advance, I prepare my answer in advance, with a source at the bottom. That's [sic] seems — that's professional, but it's impossible to do — for me to do that, unless I'm here for a month.").

¹⁰⁹ See, e.g., David Chandler, Transcript of Case 002 Trial Day 83, July 24, 2012, p. 9, ll. 19–22 ("Yes, sometimes it is a practice [not to footnote every assertion of fact]. Otherwise, historical documents would look like the Court order. I could never write a 300 page book with 4000 footnotes.")

¹¹⁰ Chandler, Transcript of Trial Day 79, p. 54, ll. 7–17. See also note 57, *supra*.

¹¹¹ See note 105, *supra*.

disputed. Challenging the notion that historians had to be perfectly neutral observers to maintain objectivity, Chandler said “I’ve never found a person who had a neutral view of Democratic Kampuchea.”¹¹²

The scope of Chandler’s expertise was also contested: Karnavas challenged his competence to evaluate the legal documents of DK — though these documents can arguably be interpreted from a number of perspectives.¹¹³ As an interpretation of the legal import of these documents, Karnavas’s point has some merit, but as an analysis that contextualizes these documents in terms of those produced by other Communist regimes, this kind of interpretive act remains more firmly located within the expertise of the historian.¹¹⁴

The question is how the perspective of the expert historian can best inform the work of the court without violating the specific practices that constrain criminal trials. While expert historians have the opportunity to contribute to the case by putting the specific facts in context — as Chandler did in his explanations of the origin and the functions of the CPK — there are limitations on how far this can go before it impermissibly opens up issues that are not properly within the scope of the case. But, to be relevant, the historian’s expertise either remains on the level of structure and context that sits in tension with the liberal emphasis on individual actions, or it relates to ultimate issues.¹¹⁵ The evidentiary rules of international criminal tribunals tend to be more relaxed on expert testimony concerning ultimate issues, because the judgment is rendered by trained judges rather than juries.¹¹⁶ But the tension remains.¹¹⁷

¹¹² Chandler, Transcript of Trial Day 83, p. 104, ll. 2–3.

¹¹³ See Chandler, Transcript of Trial Day 79, p. 71, ll. 2–8.

¹¹⁴ Chandler, Transcript of Trial Day 79, p. 71, ll. 15–20, and OCP rejoinder at p. 72, ll. 4–9.

¹¹⁵ For the tension between structural explanations and individual responsibility, see the discussion of Hannah Arendt, *infra* note 165.

¹¹⁶ See Michael Karnavas, *Gathering Evidence in International Criminal Trials: The View of the Defence Lawyer*, in *INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* 75, 148 (Michael Bohlander ed., 1997) (citing *Prosecutor v. Bagosora*, Case No. ICTR-41-98-T, Oral Decision on Defence Objections and Motion to Exclude the Testimony and Report of the Prosecution’s Proposed Expert Witness, Dr. Alison

We also see this tension in the disputes about the degree of confidence Chandler could have in his opinions; Karnavas asked whether Chandler's qualifications in answering factual questions should be disqualifying, suggesting that they indicated a lack of knowledge — or at least, a lack of the kind of certainty that is necessary for evidence in a criminal trial.¹¹⁸ Chandler responded that these kinds of inferences were necessary: “if anyone in this room knows for sure what happened . . . in S-21, as those decisions were being made — I don't think they exist. . . . I'm not going to say ‘this absolutely happened’; I wasn't there. I used documents to make — to conclude from the documents what I thought — that's all I can do, is think — happened.”¹¹⁹

One of the more interesting exchanges involved the question of how the history of the years between the fall of Democratic Kampuchea and the present has affected the historical understandings of the Khmer Rouge. The defense suggested that during this occupation, the Vietnamese may have established the dominant narrative that places all blame for the crimes of DK on the Case 002 defendants — the “Pol Pot/Ieng Sary clique.”¹²⁰ Chandler responded that the shortcomings of this standard narrative about the Khmer Rouge can be overcome through serious historical scholarship and through the legal determination of criminal responsibility.¹²¹

DesForges, or to Postpone her Testimony at Trial, Sept. 4, 2002, paras. 4–5 (“[I]n the ICTR, a historian, Dr. Alison DesForges, was permitted to render an opinion on the ultimate issue, based, in part, on reviewing anonymous testimonies. . . . the trial chamber, reminded the defence that since the trial chamber was composed of ‘seasoned judges who will not permit the opinion of an expert to usurp their exclusive domain as fact finders’ there was simply no need to disallow an expert to provide opinions and inferences on the ultimate issue.”)).

¹¹⁷ See, e.g., Carole Fink, *A New Historian?*, 14 CONTEMPORARY EUROPEAN HISTORY 135, 147 (2005) (“Clio's practitioners have now become regular fixtures in the courtroom; and senior and junior scholars staff hundreds of international, national and local commissions as well as private investigatory bodies throughout the world. Although they mete out no sentences and impose no reparations, these expert historians now inhabit a complex world of memory and forgetfulness, politics and bureaucracies, verdicts and judgements far remote from their university training. Also, these scholars have renounced the privacy and protection of their classrooms and research institutes to become public figures serving a specific paymaster, subject to strict external deadlines, exposed to blistering press and official criticism and also subject to the laws of supply and demand.”).

¹¹⁸ See Chandler, Transcript of Trial Day 79, p. 105, ll. 4–6 (“It's simply that we're in a court of law. We're not in some historical conference where we're speculating.”).

¹¹⁹ Chandler, Transcript of Trial Day 79, p. 104, ll. 11–18.

¹²⁰ Michael Vickery refers to this as the “Standard Total View.” See MICHAEL VICKERY, CAMBODIA 1975–1982 39 (1999).

¹²¹ See Chandler, Transcript of Trial Day 82, pp. 35–36.

The benefit from putting some space between a trial for administrative massacre and the events in question is that “information comes available that was not available before,” and reasoned analysis can “look[] out for easy exits, like the Pol Pot/Ieng Sary genocidal clique, or exits that suggest that the top officials knew nothing about this so therefore they shouldn’t be here.”¹²²

But the Nuon Chea team’s rejoinder (for which no specific evidence was provided) was that the documents available at the trial may have been manipulated by the Vietnamese.¹²³ The Nuon Chea defense argued, as a more general matter, that the temporal limits of the case ought not to rule out discussion of events post-’79 that had a bearing on the evidence of the ’75–’79 period.¹²⁴ As Pauw put it later, “the facts that we are talking about . . . can be influenced by later historical conventions and understandings. . . . I’m trying to link together the history of the CPP, the history of certain persons in the CPP to explain what now their attitude towards the trial might be.”¹²⁵

We can see the defense taking two approaches to the introduction of history. Karnavas used the requirement of detailed citation to undermine the basis of Chandler’s expertise. Wherever Chandler could not point to a primary source, his scholarly historical method was undermined. This may have reflected the scholarly appraisal of the team’s historian-consultant, Michael Vickery, whose opinion of Chandler’s work is that it may be eloquent and theoretically sophisticated, but not as grounded as it should be.¹²⁶ On the other hand, Pauw tried to reframe the history of the 1970s, bringing in additional context to make the trial also about American involvement in Southeast Asia and about the Vietnamese role in Cambodia after 1979. The

¹²² Chandler, Transcript of Trial Day 82, p. 72, ll. 9–15.

¹²³ See the discussion at note 96, *supra*.

¹²⁴ Chandler, Transcript of Trial Day 82, p. 79, ll. 16–21.

¹²⁵ Chandler, Transcript of Trial Day 82, p. 93, ll. 14–20.

¹²⁶ Michael Karnavas, interview with author, Jan. 17, 2013, Phnom Penh, Cambodia. For an example of Vickery’s take on Chandler, see Michael Vickery, *What to do about THE KHMERS*, 27 J. SOUTHEAST ASIAN STUDIES 389 (1996) (reviewing DAVID P. CHANDLER AND IAN MABBETT, *THE KHMERS*).

prosecution, meanwhile, was content to use historical evidence as a shortcut to documentary evidence and witnesses.¹²⁷ For them, the framing issue was resolved by the indictment and the temporal jurisdiction of the court, and the basis of historical expertise was used more informally as a means to get to primary sources. Expert interpretation helped as a way of bringing the threads together.

V. Bringing the Inside Out: The Court's Role in Shaping Cambodian Society

We must also consider how the boundary appears from the outside, from the perspective of civil society groups and individuals who are not primarily concerned with the court's operations. This requires explaining how the work of the court addresses the larger challenges of both writing Cambodian history and moving Cambodian society forward through a full recognition of (and reconciliation with) the past. As David Lorey and William Beezley observe, "At the very center of all of these issues of recovery, reconciliation, and looking forward is *history* — here in particular, the social processing of memories of genocide and collective violence."¹²⁸ The NGOs operating in this space have different interests and pursue different projects, but DC-Cam operates as a focal point for the work that surrounds the court and its position in Cambodian society. This section considers how the operations of the court feed into larger discussions of Democratic Kampuchea's place in modern Cambodian history.

The role of the court for the larger projects of memory and reconciliation is contested. One important attitude envisions a narrow role for the court. This perspective reinforces the idea of separation — less to protect the mechanisms of legality from being tainted by political and

¹²⁷ Bill Smith, interview with author, Jan. 22, 2013, Phnom Penh, Cambodia.

¹²⁸ David E. Lorey and William H. Beezley, *Introduction* to GENOCIDE, COLLECTIVE VIOLENCE AND POPULAR MEMORY: THE POLITICS OF REMEMBRANCE IN THE TWENTIETH CENTURY xiv (David E. Lorey and William H. Beezley eds., 2002).

social factors¹²⁹ than to protect the resolution of broader issues from the creeping encroachment of the law.¹³⁰ Judith Shklar has described the ideological position of lawyers as being based in “legalism,” which she describes as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”¹³¹ The position of legalism has several consequences, including an orientation that privileges specificity and individual treatment over generality — important precautions in the practice of law, but that leave it unable (and usually unwilling) to attempt to tackle larger social problems and to experiment in finding novel forms of explanation; legalism is fundamentally conservative in its ambitions.¹³² If the court views itself as engaging in the writing of history or in the project of helping people recover from trauma, it is likely to do this project badly.

An alternative view, perhaps more closely aligned with the world of international NGOs, is to erase this boundary in order to address Cambodia’s myriad problems.¹³³ The court cannot satisfy either side in this debate. It is probably doomed to be inadequate as a vehicle for engaging with history or reconciliation. At the same time, by having been invited into Cambodia by both the Cambodian government and the international community, the court is an intervention in Cambodian history and must be recognized as such; one does not invite a United Nations tribunal without expecting some shaping of Cambodian society¹³⁴ and influence in the subsequent writing of Cambodian history (in this sense, the court’s role in ascertaining the truth

¹²⁹ The function of the court as an exemplar of judicial process remains important, but proponents of this position suggest that this is distinct from the court’s ability to achieve particular substantive ends. See Youk Chhang, *When Genocide Justice is Unfair*, CAMBODIA TRIBUNAL MONITOR (Sept. 16, 2012), available at http://www.cambodiatribunal.org/sites/default/files/youk_chhang_when_genocide_justice_is_unfair_9-16-12.pdf.

¹³⁰ Youk Chhang, interview with author, Jan. 10, 2013, Phnom Penh, Cambodia.

¹³¹ JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 1 (1986).

¹³² See *id.* at 10.

¹³³ Consider Benjamin Robinson, *Against Memory as Justice*, 98 NEW GERMAN CRITIQUE 135, 138 (2006) (“The frequent loss of faith in the comprehensiveness and consistency of law is well founded, leading the imagination away from the formality of legislation and electoral mandates to the apparently more substantial lessons of historical precedent.”).

¹³⁴ See Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 ASIAN-PACIFIC LAW & POLICY JOURNAL 300, 341–342.

stands as a curious counterpoint to its reluctance to acknowledge any potential influence in historical narrative from the Vietnamese occupation).¹³⁵

Despite these shortcomings, the law has attempted to address these kinds of innately political mass atrocities. Mark Osiel captures the dilemma well: “On the one hand, we seek fidelity to a longstanding ideal of individual responsibility. Most of Western legality — including the features most normatively compelling about it — is so deeply committed to this ideal that its abandonment would surely set off wide shock waves. On the other hand, we recognize that modern mass atrocity displays peculiar features that are morally relevant to punishing its participants.”¹³⁶ He recognizes that an outside observer of these legal proceedings may well find these self-imposed limitations jarring, and that a more natural way of proceeding may be to look first to scholarship in history, psychology, sociology, economics, etc. to develop a theoretical basis for tackling administrative massacres, rather than to first turn to criminal law and mechanisms developed to deal with ordinary matters of domestic justice.¹³⁷

As Osiel describes it, those who seek to uphold narrowly legalistic values “are likely to come off as plodding dullards, distracted by doctrinal trivia from the issues of truly ‘historic’ importance before them.”¹³⁸ But, ultimately, these sorts of considerations reflect the particular position of lawyers within a society. Lawyers bring the power of the state to bear on the process

¹³⁵ There are interesting parallels between the roles of the United Nations today and Vietnam in 1979 in setting up tribunals to bring accountability to the Khmer Rouge and in setting up memorials to address the history of this period. This is not to equate the roles of the two, but merely to say that the refusal to admit the existence of even surface similarities suggests willful blindness. False equivalences make a similar error. However, the ghosts of the *in absentia* trial by the Vietnamese continue to haunt the ECCC. Jasper Pauw noted that the ECCC’s narrow temporal jurisdiction effectively marked the UN’s acceptance of the frame established by the Vietnamese, in his interview with author, Jan. 11, 2013, Phnom Penh, Cambodia. I do not wish to push the argument this far, save to note that these echoes of the past continue to be heard in contemporary Cambodia.

¹³⁶ MARK OSIEL, MAKING SENSE OF MASS ATROCITY 20 (2009).

¹³⁷ See *id.* at 24-25.

¹³⁸ MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 17 (1997).

of generating an official record of events, and this responsibility requires a more circumspect approach than the gravity of the situation might first suggest.

The basic problem is that law is forced to maintain an ambiguous relationship with the larger issues that give meaning to its operations. Law must recognize and acknowledge the broad questions that are asked in any attempt to come to terms with atrocity, even if it cannot itself answer them. Indeed, courts may err by attempting to ask excessively broad questions. The courtroom is simply not a good site for deep discussions of history, or rituals of social reconciliation, even if it has a role to play in each of those projects. As analysts, including perhaps most famously Hannah Arendt, have observed, the narrow questions that are addressed in the courtroom have the virtue of clarity, finality, and an emphasis on individual responsibility — all of which allow it to reach judgments regarding issues that may be too broad for anything resembling final resolution.

Trials allow for the possibility of getting beyond the unspeakable by virtue of their concreteness. But this is also the cause of their weakness: resolving narrow issues without a corresponding awareness of larger concerns can lead the court to misunderstand its position in the world — achieving the *form* of justice without the *substance*. As Arendt observed of the Auschwitz trials, “the court . . . tried hard to exclude all political issues — ‘Political guilt, moral and ethical guilt, were not the subject of its concern’ — and to conduct the truly extraordinary proceedings as ‘an ordinary criminal trial, regardless of its background.’ But the political background of both past and present . . . made itself felt factually and juridically in every single session.”¹³⁹

The influence of the larger background issues similarly pervades this court, despite the best efforts of the parties to carefully cabin them. The interest in the DK period among those who

¹³⁹ HANNAH ARENDT, *Auschwitz on Trial*, in RESPONSIBILITY AND JUDGMENT, 227, 231 (2003).

work in civil society generally takes one of three forms: focus on documentation and understanding of this historical period; focus on trauma and directly assisting the Cambodian people in healing through empowering them to speak; and focus on the court as a vehicle for the promotion of justice human rights more generally within contemporary Cambodia.¹⁴⁰ In other words, the contemporary interest in the trial focuses on truth, healing, and accountability. Each of these can be seen in various aspects of the court structure and proceedings.

A. The Judgment as History and the Judgment of History

Courts often struggle to accommodate the norms of historical scholarship, just as historians often struggle to fit their work into juridical forms, suggesting a basic mismatch between the goals of each project. Daniel Farber summarizes the problem as: “For the lawyer, the question is whether the litigation process can claim the goal of establishing truth. For the historian, the question is whether scholarship can be distinguished from advocacy, or objectivity from ideology.”¹⁴¹ There are problems in bringing historical expertise within the rules of procedure and evidence, and then presuming that the findings of fact in a (historical) trial are the same kind of factual accounts that may be provided by historical scholarship. The task of understanding and explaining the past may simply be different than the task of coming to judgment about alleged crimes that occurred in the past; the function of historical analysis and judgment may be complementary but fundamentally different.¹⁴² This is independent of the

¹⁴⁰ Bronwyn Anne Leebaw describes the basic goals in similar terms: “1) to counter denial and promote accountability; 2) to expand dialogue and open political space to previously marginalized or silenced people; and 3) to alleviate volatile emotions associated with trauma and the desire for revenge.” See Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 98 (2008). Note, however, the widespread skepticism of the goal of capacity building through the court. This was raised in both Youk Chhang, interview with author, Jan. 10, 2013, Phnom Penh, Cambodia; and Robert Finch, interview with author, Jan. 9, 2013, Phnom Penh, Cambodia.

¹⁴¹ Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009, 1019-1020 (1998).

¹⁴² See Richard J. Evans, *History, Memory, and the Law: The Historian as Expert Witness*, 41 HISTORY AND THEORY 326, 330 (2002) (“Above all, perhaps, in criminal trials the central issue is that of guilt or innocence,

additional problems that arise from a party-driven fact finding process: “As long as advocates exist, so will warped history.”¹⁴³ Reuel Schiller offers a good account of both the problems facing the historian testifying as an expert, and the challenge of lawyers in coming to terms with a scholarly project that questions naïve notions of objectivity without falling into “radical anti-foundationalis[m].”¹⁴⁴ Schiller suggests that the real threat to establishing historical truths in the courtroom is less the academic commitment to multiple perspectives and skepticism than “falsehoods, myths, and ideologically-biased narratives masquerading as truths under the banner of objectivity.”¹⁴⁵

The form of judicial fact-finding tends to quash the subtleties of historical analysis in the attempt to establish a robust, iron-clad narrative of the events within the limited scope of the indictment, fitting what Mark Osiel describes as the model of closure, based on Durkheim’s approach to solidarity as requiring social consensus: the uniformity of the narrative and judgment is what expresses social value.¹⁴⁶ At the opposite end of the spectrum, Osiel situates Lyotard and the view that dissensus is valuable in its own right for exploding the closed nature of

concepts which are not only far from central to the historian’s enterprise but also, some would argue, entirely alien to it; for what historians are, or should be, engaged in, is explanation and interpretation, not moral judgment. Historians are simply not trained to make moral judgments or findings of guilt and innocence; they have no expertise in these things, and so should not be asked to engage in them, or to serve their purposes, by a court of law.”). Recall the admonition of Ginzburg, *supra* note 107.

¹⁴³ Reuel E. Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 HASTINGS L.J. 1169, 1175 (1998).

¹⁴⁴ *Id.* at 1172 (“The existence of these debates, or the fact that each side accuses the other of bias, is not a denial of the existence of objective truth. It is just a dialogue (or screaming match) among historians who are taught to be wary of other people’s biases.”)

¹⁴⁵ *Id.* at 1169. See also Michael Dintenfass, *Truth’s Other: Ethics, the History of the Holocaust, and Historiographical Theory after the Linguistic Turn*, 39 HISTORY AND THEORY 1, 9 (2000) (“What poses the most dangerous threat to the empirical accuracy of the historian’s reconstructive and interpretive endeavors . . . is not the lapse into relativism . . . but the ‘simplistic view’ of objectivity that positivism — ‘an abuse of the scientific method’ — has bequeathed to the historical profession.”). Dintenfass later suggests that “To recognize right and wrong as the long forgotten other of history’s true and false by no means consigns students of the past to the abyss that terrifies Bartov and Evans. Rather, it holds out the promise of emancipation from epistemological ambitions at once unedifyingly narrow and, as years of historiographical investigation have shown, inherently unstable, and it enables historians to embrace without embarrassment the ethical force that has always animated the best historical narrative.” See *id.* at 20.

¹⁴⁶ Osiel, MASS ATROCITY, *supra* note 138, at 24–35.

Durkheimian consensus.¹⁴⁷ The midpoint of the spectrum Osiel describes as the liberal position, in which competing narratives can coexist within an atmosphere of mutual respect and civility, as a way of creating solidarity through a shared commitment to a project of working through the process of judgment.¹⁴⁸ *Pace* Durkheim, we should focus on the constructive *process* of the trial, rather than the judgment. Osiel endorses a model of civil dissensus, in which the judgment *opens* questions rather than *closing* them.¹⁴⁹ Koskenniemi notes that there will always be competing narratives: “For any major event of international politics — and situations where the criminal responsibility of political leaders is involved are inevitably such — there are many truths and many stakeholders for them.”¹⁵⁰ Osiel notes the implication of the multiplicity of narratives within the courtroom: “These accounts search for authoritative recognition, and judgments likely will be viewed as endorsing one or another version of collective memory. . . . Better to face facts, to learn to live with the reality that such trials will necessarily be read for their ‘larger lessons,’ as monumental didactics.”¹⁵¹ The court is already the setting for contests to control narrative.

But Osiel wonders whether this is something that can actually occur within the performance of a trial: “Must prosecutorial decisions about the dramatic staging of a trial for administrative massacre be kept ‘backstage’ . . . never acknowledged in public, for fear of being charged with partisan ‘manipulation’ or with breaching the judicial ethic of impartiality?”¹⁵² He concludes that the parties should recognize the thoroughgoing nature of narrative for criminal law, and that this need not result in any kind of radical anti-foundationalism. As attractive as this model is in terms of situating the judgment within larger issues of social meaning, it seems

¹⁴⁷ *Id.* at 51–53.

¹⁴⁸ *See id.* at 53.

¹⁴⁹ *Id.* at 41–47.

¹⁵⁰ Koskenniemi, *supra* note 16, at 12.

¹⁵¹ Osiel, *MASS ATROCITY*, *supra* note 138, at 39–40. For didactic functions of trials generally, *see* LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* (2001).

¹⁵² *See* Mark Osiel, *Making Public Memory, Publicly*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 217, 221 (Carla Hesse and Robert Post eds., 1999).

difficult to square the goal of dissensus with the obligations of meeting a high burden of proof in a criminal trial. To the extent that findings of legal guilt require proof beyond reasonable doubt, the model of dissensus seems to require the acknowledgement of doubt, or at least of open-endedness that sits uncomfortably with the principle of *res judicata*.

Jose Alvarez offers a slightly different perspective, in which the parties to the trial accept the impossibility of reconciling judgment with good history, but in which the court's presumption of innocence tilts the scales in favor of the defendant. "We might opt for flawed historical accounts in the course of criminal judgments on the assumption that the process of civil dissensus will correct bad history but is incapable of truly rectifying a mistaken verdict against a defendant, at least from the perspective of an individual who unjustly serves prison time."¹⁵³ Alvarez recognizes that the needs of liberal dissensus in the writing of history and the burden of proof required of criminal judgment are at odds.

What of the products of judicial attempts to define history? Alvarez notes of the *Tadić* judgment, the first issued by the ICTY, "Tadić's judges are demonstrably poor historians. It seems inconceivable that anyone, even those favorably disposed to the judges' version of the facts, can read the judges' historical account as a convincing or definitive history."¹⁵⁴ Richard Ashby Wilson, however, has argued that atrocity trials can produce accurate and valuable histories.¹⁵⁵ It is difficult to reconcile these two positions, but this difference may follow from what the two critics want from their histories: Alvarez focuses on the impossibility of using court histories to achieve closure, while Wilson focuses on the possibility of achieving factual accuracy. But, as mentioned above, the function of history in these trials is only partly about being a source of accurate facts; the more important aspect of this history is about how the facts

¹⁵³ Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2105 (1998).

¹⁵⁴ *Id.* at 2055.

¹⁵⁵ RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 18-19 (2011).

are marshaled to define accountability.¹⁵⁶ On this reading, even if Wilson is correct that the Tadić court provided a better historical narrative than the nationalist myths circulating in the former Yugoslavia (not necessarily a high bar to meet), this still does not mean that it contributed to an accurate or useful historical framing of the conflict.

The problem, which Wilson downplays, is of distinguishing history that is useful for historical ends from history that is useful for informing judicial ends. The issue is not the forum in which history is discussed — as though the courtroom would otherwise operate as a history-free zone — but rather the ends to which the history is directed; courtrooms are simply inappropriate fora for wide-ranging historical inquiry. The courts' engagement with history may be sufficient as a means of providing a factual foundation for judgment, while remaining unhelpful as a contribution to historical discourse.¹⁵⁷ History in the courtroom is in some sense fundamentally different from history in the seminar room.¹⁵⁸

Consider Chandler's testimony in case 001. Francois Roux, defense attorney for Duch (the head of S-21), asked Chandler whether he thought "this trial will be of service to history."¹⁵⁹ Chandler responded: "I think it's important that all of these accused people face up to their responsibilities to the truth of what happened when they had positions of power, to question that evidence if it's unreliable or false, and to allow the Cambodian people, at least some of them, to

¹⁵⁶ See Part I, *supra*.

¹⁵⁷ See Damaška, *supra* note 74, at 336 ("But the intensity of the urge to make a historical record is not matched by the capacity of judges to satisfy it. One reason is that they must act under time constraints and make stable decisions upon which action is taken — the *res* upon which they focus must become *judicata* without undue delay. Historians, on the other hand, are not subject to the constraints of promptness and finality—they need not rush to a decision and can afford to follow the slow breathing of history. Whenever Clio, their elusive mistress, reveals a new veil to fold into, they are free to modify their findings. *Res judicata* in the historians' domain is nothing less than an absurdity — history cannot be arrested by *ukase*.").

¹⁵⁸ See Henry Rousso, *Justice, History, and Memory in France: Reflections on the Papon Trial*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 277, 278–279 (John Torpey ed., 2003) ("[B]ecause the court relied on archival documents more than on direct witnesses . . . , it implicitly developed a form of 'historical narrative' that appeared to be quite similar to that constructed by historians. In reality, however, this narrative was far removed from the historian's narrative because by definition it had to submit to the dictates of a juridical reading in a case involving the penal charge of a crime against humanity.").

¹⁵⁹ Transcript of Case 001 Trial Day 55, Aug. 6, 2009 at p. 104, ll. 18–19.

have some awareness of what happened in a scale wider than their horrific stories anybody in this room can pick up from any Cambodian person over 40.”¹⁶⁰

Picking up the question of the responsibilities of subordinates, Chandler’s testimony in Case 001 included an extended discussion of the Milgram Experiment¹⁶¹ with the conclusion that “this gets very close to the culture . . . of Democratic Kampuchea where the people who gave the orders were accustomed to giving them; the people who received the orders were accustomed to obeying. There is no culture in Cambodia of questioning commands by someone who is an authority.”¹⁶² When Roux proceeded to read out the final sentence of Chandler’s book on S-21 (“In order to find the root of evil that was implemented every day at S-21, we should not look any further than ourselves”), Chandler noted that “it was not written in or for a judicial proceeding.”¹⁶³ He proceeded to explain that the point of this was to push back against the tendency to moralize, and instead to acknowledge the universal capacity to do evil — but that this recognition does not excuse or exculpate specific evil acts.¹⁶⁴

Hannah Arendt explained the limitations of law in similar terms, contrasting the formality and specific limitations of the law with the larger issues at stake in the Eichmann trial: “there exists still one institution in society in which it is well-nigh impossible to evade issues of personal responsibility, where all justifications of a nonspecific, abstract nature . . . break down, where not systems or trends or original sin are judged, but men of flesh and blood like you and me.”¹⁶⁵ But the decision to try individuals in this way structures the how the problem is described. The legal focus on individual responsibility and individual acts means consigning

¹⁶⁰ David Chandler, Transcript of Case 001 Trial Day 55, at p. 105, ll. 9–15.

¹⁶¹ See Case 001 Trial Day 55, at pp. 116–118.

¹⁶² Case 001 Trial Day 55, at p. 118, ll. 17–22.

¹⁶³ Case 001 Trial Day 55, at p. 120, ll. 4–8.

¹⁶⁴ Case 001 Trial Day 55, at pp. 120–121.

¹⁶⁵ HANNAH ARENDT, *Personal Responsibility under Dictatorship*, in RESPONSIBILITY AND JUDGMENT, *supra* note 139, at 17, 21.

structural explanations to the background; as Koskeniemi puts it, “individualization is not neutral in its effects.”¹⁶⁶ His position is that sometimes an individual focus is appropriate, while sometimes the contextual focus is appropriate; but that it is impossible to determine a priori that a criminal trial is the best option. The choice of the legal frame structures the possible solution space.

There are numerous ironies in the historical accounts generated by the court through its pursuit of legal accountability. Consider the role of S-21, one of the major prisons of the regime. As mentioned above, the Vietnamese took a major interest in S-21, as part of their legitimization of the occupation of Cambodia. This included efforts to memorialize the prison as similar to Auschwitz. Yet the parallel is flawed: while the concentration camps were used to imprison Jews who had been targeted solely on account of race, S-21 held enemies of the regime who came from the ranks of Khmer Rouge cadres. The ECCC has similarly made S-21 central to the trials, due to the voluminous evidence from the prison and the gravity of the crimes that occurred there.¹⁶⁷ But it remains far from the experience of the millions of Cambodians who suffered in Democratic Kampuchea.¹⁶⁸

Given the limitations that exist on the legal work of the court, no party can abandon its strategic goals in order to identify historical lessons.¹⁶⁹ The prosecutors have a case to prove, and direct their focus toward proving the elements of the charged crimes; the defense attorneys must

¹⁶⁶ Koskeniemi, *supra* note 16, at 14.

¹⁶⁷ Due to the strange procedural history of Case 002 — which was divided into mini-trials by the Trial Chamber before that decision was overturned by the Supreme Court Chamber — the trial has focused on the evacuation of Phnom Penh. I note, however, the efforts of the Prosecution to bring S-21 within the scope of Case 002/01. See Doreen Chen, *Case 002/01 to Resume with its Previous Scope*, CAMBODIA TRIBUNAL MONITOR (March 29, 2013), available at <http://www.cambodiatribunal.org/blog/2013/03/case-0021-resume-its-previous-scope-nuon-chea-confirmed-fit-stand-trial>. For the Supreme Court Chamber’s decision to annul the severance, see Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, Supreme Court Chamber, Feb. 8, 2013.

¹⁶⁸ This point was noted by Anne Heindel, interview with author, Jan. 17, 2013, Phnom Penh, Cambodia.

¹⁶⁹ Bill Smith described this as fundamentally a problem of resource allocation. While the larger issues are important, they are best addressed by others, leaving the attorneys to focus on the case itself. Bill Smith, interview with author, Jan. 22, 2013, Phnom Penh, Cambodia.

rebut this evidence and identify holes in the prosecution's case. This cannot be totally divorced from the facts on the ground, but neither can the demands of writing nuanced history distract the parties from their tasks.

B. Collective Reparations and Genocide Education

Victims play a vital role in the ECCC, reflecting the court's orientation toward hearing a variety of voices speaking on the crimes of the past. Victim participation may serve a therapeutic function — this is a contested issue that is beyond the scope of this paper.¹⁷⁰ But it also serves as a mechanism for the telling of a particular kind of narrative about the events of Democratic Kampuchea: one that has less to do with the structure of command authority or about the resonances and dissonances among Chinese and Cambodian and Soviet and Western variants of Communism, but that has everything to do with getting at the particular experiences of individuals living in Cambodia. Victim testimony provides a necessary outlet for emotional evidence in proceedings that emphasize the formalities of legal reason.¹⁷¹ But it also ties into the Durkheimian project of symbolism and communal affirmation critiqued by Osiel above.¹⁷²

Martti Koskeniemi suggests that the truth-finding function of international criminal trials “has been thought necessary so as to enable the commencement of the healing process in the victim: only when the injustice to which a person has been subjected has been publicly recognized, the conditions for recovering from trauma are present and the dignity of the victim may be restored.” By contrast, when viewing trials as elements of a broader effort at achieving transitional justice, the function of judgment is as a symbolic affirmation of social norms and communal healing — for which “it is sufficient that a few well-published trials are held at which

¹⁷⁰ See Mahdev Mohan, *The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal*, 9 INT'L CRIM. L. REV. 733, 737 (2009). See also Martha Minow's suggestion that therapeutic purposes could offer a path “between vengeance and forgiveness,” Minow, *supra* note 11, at 21.

¹⁷¹ See Gewirtz, *supra* note 3, at 145.

¹⁷² See note 146, *supra*.

the ‘truth’ of the past is demonstrated, the victims’ voices are heard and the moral principles of the (new) community are affirmed.”¹⁷³ But, as Koskenniemi argues, while this function may be served by show trials within domestic courts, show trials lack any didactic and symbolic function in international tribunals, for which there is no identity between the actors in the court and the injured community: “Every failure to prosecute is a scandal, every judgment too little to restore the dignity of the victims, and no symbolism persuasive enough to justify the drawing of the thick line between the past and the future.”¹⁷⁴

The testimony of victims and civil parties is particularly important given the expressly didactic function of the ECCC. Amidst dry testimony concerning the provenance of documents or the personnel in Office 870, the testimony of the victims regarding their own injuries and the deaths of family members stands out.¹⁷⁵ In making the injuries concrete, the statements of victims generate possibilities for addressing the larger questions of justice that Arendt deems inaccessible to the law. But there is an inherent tension in that the civil parties do not necessarily want to merely describe their pain in ways that fit the format of the established trial; the need to maintain order at the trial has cabined the role of the civil parties to address their individual experiences in a way that may, in some sense, re-victimize them.¹⁷⁶ Mohan argues instead that “victim-centrism’s therapeutic goals would be better served by a new victimology rooted in inherently local conceptions of storytelling, art and ritual that avoid universalized narratives and deploy extra-legal ideas about mass atrocity in Cambodia.”¹⁷⁷

¹⁷³ Koskenniemi, *supra* note 16, at 10.

¹⁷⁴ *Id.* at 11.

¹⁷⁵ Elisabeth Simonneau-Fort, interview with author, Jan. 7, 2013, Phnom Penh, Cambodia.

¹⁷⁶ See Mohan, *supra* note 170, at 760–761. See also *id.* at 767 (“When victims learn that the ECCC’s s gift of legal standing comes with strings attached, i.e. that victims cannot be the Tribunal’s ‘driving force,’ but must take a back seat to the Prosecution and defer to the Defendant’s rights, the victims I spoke to were unimpressed.”).

¹⁷⁷ *Id.* at 740.

The civil parties are limited to “moral” and “collective” reparations,¹⁷⁸ and current proposals focus on education about the history of Democratic Kampuchea, memorials for the victims, and traveling exhibits to show physical artifacts from the period to people throughout Cambodia.¹⁷⁹ These efforts dovetail with those of local NGOs to teach Cambodian history — particularly as it relates to the DK era — to students.¹⁸⁰ This explicitly connects the possibility of justice for victims of the Khmer Rouge to the writing and transmission of history, based on ongoing scholarship. This kind of historical writing has one particular advantage over the history produced by the trial itself: it can be open-ended, subject to revision, and part of an ongoing conversation about accountability and justice in the wake of mass violence. As Martha Minow observes, ultimately “the truth-telling surrounding the struggles for reparations can alter attitudes more than the reparations themselves, yet the palpable symbolism of actual reparations will redeem those struggles in ways that all the narration and fact-gathering never could.”¹⁸¹

The preservation of the memory of the crimes of Democratic Kampuchea also serves as a backstop to combat revisionism. The record generated by the trial and preserved (and expanded upon) through the civil parties’ moral reparations gives a window, however imperfect, into some of the major crimes in this period and shows that they have been subjected to the formality of an adversarial criminal trial. Antonio Cassese noted that one function of the ICTY was to ensure that “In the years and decades to come, no one will be able to deny the depths to which their

¹⁷⁸ The results of surveys conducted by the Human Rights Center of the University of California, Berkeley reveal interesting patterns. See Phuong Pham et al., *So We Will Never Forget: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia*, UNIVERSITY OF CALIFORNIA HUMAN RIGHTS CENTER (2009); and idem., *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia*, UNIVERSITY OF CALIFORNIA HUMAN RIGHTS CENTER (2011). On the subject of reparations, provision of social services, access to justice, support for agriculture, and direct money payments were all deemed far more important than symbolic/moral reparations. See *After the First Trial*, at 39. Of the possible forms of moral reparations, memorials, ceremonies, and social services were deemed most important. See *id.* at 41.

¹⁷⁹ Elisabeth Simonneau-Fort, interview with author, Jan. 7, 2013, Phnom Penh, Cambodia.

¹⁸⁰ See DC-Cam’s Genocide Education project, at http://www.dccam.org/Projects/Genocide/Genocide_Education.htm.

¹⁸¹ Minow, *supra* note 11, at 132.

brother and sister human beings sank.”¹⁸² The same sentiment holds true in Cambodia, where many in the younger generation find it difficult to reconcile the stories that they hear from parents and grandparents with their understandings of human nature.¹⁸³

A recurring challenge is that many individuals, and not only former Khmer Rouge, have no desire to re-open the wounds of the 1970s. Yet the wounds remain, often festering through the decades. The relationship of the past to the present remains in need of explication: whether the past must be confronted and interrogated,¹⁸⁴ or whether strategic forgetfulness and myth-making is necessary for the maintenance of transitional justice mechanisms.¹⁸⁵ This question has been addressed through the long attempt of post-war German intellectuals to understand how to confront their own past — a political and cultural context that is substantially dissimilar to that of contemporary Cambodia. While the lessons of Habermas,¹⁸⁶ Adorno,¹⁸⁷ et al. are probably not immediately transferable to the Cambodian context, it is important to bear in mind the tension

¹⁸² Quoted in Fergal Gaynor, *Uneasy Partners — Evidence, Truth and History in International Trials*, 10 J. INT’L CRIM. JUSTICE 1257, 1261 (2012).

¹⁸³ The Berkeley surveys show a widespread desire to know more about the regime, particularly among those who did not live through it. See *So We Will Never Forget*, *supra* note 178, at 26; and a contrast between the desire on the part of the older generation for the accused to confess and tell the truth of the events, as compared with the desire on the part of the younger generation for the accused to apologize and demonstrate remorse, see *id.* at 30. Interestingly, the expressed importance of seeking the truth increased between the 2008 and 2011 surveys. See *After the First Trial*, *supra* note 178, at 35. See also *A Thirst for Justice Delayed*, HARVARD GAZETTE (April 2013), available at <http://news.harvard.edu/gazette/story/2013/04/a-thirst-for-justice-delayed>.

¹⁸⁴ This position is most closely associated with Jürgen Habermas. See John Torpey, *Habermas and the Historians*, 44 NEW GERMAN CRITIQUE 5, 12 (1988) (“A ‘past which can be agreed upon’ is not necessarily a past that provides an emancipatory orientation to the present. Habermas’s objection to this type of reconciliation with an unsavory past is well summarized in Walter Benjamin’s oft-cited remark that ‘there has never been an artifact of culture that is not at the same time an artifact of barbarism.’”).

¹⁸⁵ See Leebaw, *supra* note 140, at 109. “Another message that many transitional justice institutions seek to convey is that individuals can and should be held responsible for systematic political violence. In contrast with the Habermasian goal of confronting and learning from the past, these historical lessons are framed in relation to the needs of the present: to legitimate transitional justice institutions and transitional regimes. Insofar as the historical lessons associated with transitional justice institutions function to avoid volatile conflict or contentious issues, they combine history and political myth in the spirit of Renan’s claim that ‘[t]he essence of a nation is that all individuals have many things in common, and also that they have forgotten many things.’”

¹⁸⁶ See the voluminous literature about the *Historikerstreit*.

¹⁸⁷ See Theodor W. Adorno, *What Does Coming to Terms with the Past Mean?*, in BITBURG IN MORAL AND POLITICAL PERSPECTIVE 114 (Geoffrey H. Hartman ed., 1986).

between perpetuating myths for the purpose of social stability and potentially explosive confrontations with the past.¹⁸⁸

The danger of perpetuating mythology is the recapitulation and internalization of the state's narrative. Even today, the function of the museum at S-21 is to "present a prepackaged, summarized, public version of events for view both by Khmer and by foreigners. It precisely collapses space and time in ways that Vickery labels distortions. In doing so, the museum provides an explanation for the inexplicable, and creates from death a reestablished sense of national identity."¹⁸⁹ Judy Ledgerwood explains how, over time, the museum's message gains power by both tapping into existing feelings of injustice and providing a frame that encourages the reinforcement of these messages. In time, "the writings [in the visitor book] echoed almost precisely the rhetoric of the state publications. Standardized phrases emerged. The message was: first, that Cambodians *want to remember* the criminal acts of the Pol Pot-Ieng Sary-Khieu Samphan clique ...; and second, that the purpose of this remembering is to *prevent the return of the Khmer Rouge to power*."¹⁹⁰ Memorialization can play an important role in providing immediacy to historical lessons that cannot be adequately replicated in texts alone. And yet, memorialization risks providing an easy escape from confrontation with deeper, systemic issues, such as class conflict, racial and religious tension, and deep-seated cultural myths.

VI. Conclusion: The ECCC as a Lesson in Hybridity

This paper has argued that the ECCC has actively shaped the boundary between the legal mechanisms within the court and the broader issues of modern Cambodian history, as well as the

¹⁸⁸ A future paper will address comparisons between the later Holocaust trials and the Khmer Rouge trials, to examine how the social and historical scholarship in the European context does or does not change the relationship between law and history.

¹⁸⁹ Judy Ledgerwood, *The Cambodian Tuol Sleng Museum of Genocidal Crimes: National Narrative*, in GENOCIDE, COLLECTIVE VIOLENCE, AND POPULAR MEMORY, *supra* note 128, at 103, 104.

¹⁹⁰ *Id.* at 111.

nature of the boundary itself. Maintaining the separation between the interior space of the law and the exterior space of Cambodian history is essential for several reasons, including the prevention of undue political influence on the legal process. However, this paper has also shown that this separation is never absolute — nor should it be. On the contrary, the legal process at the court is always steeped in the large issues of Cambodian history that give it meaning, and observers of the court recognize that it will play an important role in shaping extra-legal discussions of the Khmer Rouge period. This is straightforward.

This blurring of the functions is only a problem because the legal norms that the court employs and the norms of historical inquiry are at odds in a very fundamental sense, owing to the clash between the pragmatic need for certitude and *res judicata*, and liberal open-endedness. We can see the defense counsel take two divergent approaches: Karnavas has tried to bring the testimony of historical experts (such as Chandler and Chhang) fully within the norms of legal discourse, which would rob them of their particular power to address wider issues. Pauw has instead tried to identify the larger historical issues that are implicit within the narrow scope of the trial in order to claim that the trial is structured to be unfair. Both of these approaches depend on the maintenance of a strict separation between law and history — what Latour calls the work of purification.¹⁹¹ The Prosecution, by contrast, has used historical expertise as a window into the documentary and testimonial evidence, and has seen no particular problem that needs resolution.¹⁹² The approach of the parties reflects the model of purification.

The more interesting question is how the court deals with this tension. Osiel contrasts the Durkheimian approach, which seeks closure and consensus, with his model of “dissensus.” But

¹⁹¹ See Latour, *supra* note 15.

¹⁹² Note, however, that Michael Karnavas also stressed the importance of having historians inform the defense teams during the investigative stages, when their expertise can compensate for an unstable and still-developing factual foundation. Michael Karnavas, interview with author, Jan. 17, 2013, Phnom Penh, Cambodia.

dissensus seems incompatible with the particular needs of the court to reach finality and to base conviction (particularly in a politically charged context) in robust fact-finding. In this conclusion, I suggest a middle path, which accepts the pragmatic need for closure in the legal judgment, while leaving open the possibility of dissensus in the larger historical discourse. Such an approach would draw attention to the work of boundary drawing and the necessary fiction of purification, and to the reasoning that informs how evidence is received in the first place. The approach would not seek greater factual precision in the judgment than the record allows, but neither would it shy away from the need to reach finality. By making explicit the constructedness of the legal reasoning, it simultaneously brings into the ambit of the court, while still keeping at arm's length, the existence of extra-legal influences. I suggest that this would be superior to leaving them unaddressed.

A. The Work of Purification Draws Attention to Hybridity at the ECCC

Consider the Nuon Chea team's objection to Hun Sen's statement that their client was a murderer.¹⁹³ Both the Trial Chamber and the Supreme Court Chamber affirmed that this statement carried no legal weight and would not affect the decision-making of the chamber. Of course, these guarantees only highlighted the omnipresent question of corruption at the court — why make the obvious point that the Prime Minister's remark would not affect the legal process unless there was already pervasive suspicion that it would? By not addressing *that* — the specter of impropriety — this attempt to reinforce the purification of law and politics had the opposite effect. It is the inability to name the problem that constitutes the real challenge for the court.

If these problems could be addressed directly (without having them swallow up the proceedings), it is possible that little would substantively change regarding the ongoing cases —

¹⁹³ See the discussion on p. 22.

but the court would take the significant step of making its decisions about fact-finding more defensible.

By framing the problem in this way, I follow Bruno Latour's use of hybrid objects as challenging the conceptual separation of nature and society.¹⁹⁴ The hybrid legal/historical character of the record generated by the ECCC similarly challenges the separation of law and history described above. But, just as Latour attempts to find a new ontology in the collapse of purification (rather than retreating into either total constructivism or naïve realism), so too this focus on hybridity avoids the Scylla of law-as-pure-politics and the Charybdis of naïve-legal-formality.

B. The Possibility of Justice Cannot be Grounded in Absolute Purification

The ultimate lesson of the ECCC is that a court in its situation — politically compromised and within a society lacking robust legal institutions or expertise — cannot provide the same presumption of fairness that is upheld as an ideal. It is simply not structured in a way that could do so, whatever its judges may say. But to use this to rule out *ex ante* the possibility of creating a body like the ECCC would rule out the possibility of law within many transitional societies which similarly lack mechanisms to ensure fairness. It would formalize impunity — itself a heightened form of injustice.

By contrast, a court in a transitional society could acknowledge the problems that it faces and then do the best work that it can, given those constraints. This would not excuse the lapses from the ideals of legality that would occur — the maintenance of a pure legal space remains a worthwhile ideal — but neither would it make a fetish out of certain legal protections that are not

¹⁹⁴ The ECCC is, of course, also “hybrid” in a more traditional sense — as a hybrid of international and domestic legal systems. This institutional hybridity reinforces the Latourian hybridity analyzed in this section: the involvement of the United Nations signifies the aspiration to follow developed international law, while the Cambodian dimension signifies the inescapability of Cambodian history at the tribunal.

necessarily attainable in our societies either, as a tradition of legal theory from the Realists through critical legal studies has taught us. Rather than requiring justice to be binary — either fully present or not at all — we can try to use the experience of the ECCC to understand the form of justice taken by this imperfect vehicle.

This echoes an argument made by Guyora Binder to rebut the charge that human rights law is an imposition of Western cultural imperialism. As he notes, “Why does the legitimacy of international human rights law depend upon the possibility of establishing universal moral truths? We do not usually place such a heavy burden of proof on domestic legal regimes.”¹⁹⁵ His solution to this dilemma is to reframe the question in a more pragmatic way: “we should ask how human rights law contributes to building decent and democratic societies in a developing world suspended between local and global cultural structures.”¹⁹⁶ However, creating a system of human rights law that contributes to such a project requires more than autonomous institutions and initiatives; the discourse of human rights must be woven into the fabric of domestic and international legal and extralegal systems.¹⁹⁷ Binder’s solution reflects the necessity of linking the legal project of the Khmer Rouge tribunal to the development of robust domestic legal norms and of framing the development of human rights as part of an ongoing process.

C. Acknowledging Hybridity Need Not Taint the Work of Historian or Judge

The ECCC has experienced more than its share of political interference. It may seem perverse to suggest that the relaxation of legal ideals can improve this court. But the point is not to excuse these lapses — merely to acknowledge that in the context of transitional justice they will always be present. There are fundamental trade-offs to be made in having an

¹⁹⁵ Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 216 (1999).

¹⁹⁶ *Id.* at 221.

¹⁹⁷ *See id.*

internationalized tribunal to address mass atrocity under weak domestic laws. Recognition of this fact allows for honesty in assessing how such tribunals operate.

Hybridity may be an important starting point in dealing with problems that inevitably transcend issues of law and of history. Faced with mass atrocities that rend the fabric of a society and have deep historical and cultural roots, historical scholarship without legal accountability may be empty, while law without historical expertise is blind. The magnitude of the crimes of Democratic Kampuchea demands a full accounting that transcends what either history or law can do alone. But the two cannot be presumed to operate in tandem; legal fact-finding can do violence to history, even as historical understanding can lead to the evasion of tough findings of accountability. Hybridity allows for the recognition of this tension, and of our inability to fully address either side of the division.

The failures of the ECCC thus bring with them an important lesson on the limits of law. Between the recognized failure in having Pol Pot escape a full accounting by dying in the jungle, and the recognized failure of legality in the 1979 Vietnamese show trial, in which the defense counsel for Pol Pot and Ieng Sary described them as “criminally insane monsters,”¹⁹⁸ the perceived failures of the ECCC may nevertheless represent a modest outcome for a bad situation. In castigating the ECCC for failing to live up to Western norms of legality, we ought to be wary of reifying a fictive vision of legal absolutism.

¹⁹⁸ See PETER H. MAGUIRE, *FACING DEATH IN CAMBODIA* 66 (2005).